EXTRACT FROM BY-LAWS

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.

991

No. 2721

United States

Circuit Court of Appeals

For the Ninth Circuit.

FRANK M. McKEY, Trustee in Bankruptcy of TOMLINSON-HUMES, Incorporated, Bankrupt,

Appellant,

vs.

ELI P. CLARK and LOS ANGELES WAREHOUSE COMPANY, a Corporation,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 2721

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys.

For Appellant:

Messrs. MULFORD & DRYER, Suite 615 I. N. Van Nuys Bldg., Los Angeles, California,

and

WILBUR BASSETT, Esq., 333 Van Nuys Building, Los Angeles, California.

For Appellee:

Messrs. HERBERT J. GOUDGE and HARTLEY SHAW, 1024 Washington Bldg., Los Angeles, California. [4*]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

FRANK M. McKEY, Trustee in Bankruptcy of TOMLINSON-HUMES, INCORPORATED, Bankrupt,

Complainant,

vs.

ELI P. CLARK, LOS ANGELES WAREHOUSE COMPANY, a Corporation,

Respondents.

Citation [Original.]

The President of the United States to Eli P. Clark and Los Angeles Warehouse Company, a Corporation, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Ap-

*Page number appearing at foot of page of original certified Record.

peals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California on the 11th day of November, next, pursuant to an order allowing an appeal entered in the clerk's office of the District Court of the United States for the Southern District of California, Southern Division, in that certain action No. A–101—Equity, in which Frank McKey, Trustee in Bankruptcy of Tomlinson-Humes, Incorporated, Bankrupt, is complainant and appellant and you are respondents and appellees, to show cause, if any there be, why the decree rendered against the said complainant and appellant as in this said order allowing an appeal mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable OSCAR A. TRIPPET, Judge of the United States District Court in and for the Southern District of California, Southern Division, this 13 day of Oct., 1915.

OSCAR A. TRIPPET,

Judge. [5]

[Endorsed]: Original. No. A–101—Equity. In the District Court of the United States, for the Southern District of California, Southern Division. Frank M. McKey, Trustee in Bankruptcy, etc., Complainant, vs. Eli P. Clark et al., Respondents. Citation. Filed Oct. 14, 1915. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk.

Due service and receipt of copy of within Citation

acknowledged this 13th day of October, 1915.

HERBERT J. GOUDGE,
HARTLEY SHAW,
Attorneys for Respondents. [6]

[Order Granting Motion for Leave to Amend Complaint.]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. A-101—EQUITY.

FRANK M. McKEY, Trustee in Bankruptcy of TOMLINSON-HUMES, INCORPORATED, Bankrupt,

Complainant,

vs.

ELI P. CLARK and LOS ANGELES WAREHOUSE COMPANY, a Corporation,

Respondents. [7]

At a stated term, to wit, the July term, A. D. 1913, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the Courtroom Thereof, in the City of Los Angeles, on Wednesday, 17th day of December, in the Year of our Lord One Thousand Nine Hundred and Thirteen. Present: The Honorable OLIN WELLBORN, District Judge.

No. A-101—EQUITY.

FRANK M. McKEY, Trustee, etc.,

Complainant,

vs.

ELI P. CLARK et al.,

Defendants.

This cause coming on this day to be further heard on complainant's motion for an injunction *pendente lite,* pursuant to the prayer of the bill of complaint, and also to be further heard on defendants' motion to dismiss the bill of complaint, and also to be further heard on defendants' motion to strike out certain portions of paragraph V of the bill of complaint; Wilbur Bassett, Esq., and Geo. W. Dryer, Esq., appearing as counsel for complainant; Hartley Shaw, Esq., appearing as counsel for defendants; now comes said Wilbur Bassett, Esq., of counsel for complainant, and moves the Court for leave to amend the bill of complaint herein; and it is ordered that complainant's said motion for leave to amend the bill of complaint herein be, and the same hereby is granted, and that complainant be, and he hereby is granted leave so to amend within twenty (20) days.
[8]

[Order Extending Time 10 Days to File Amended Bill of Complaint.]

At a stated term, to wit, the July term, A. D. 1913, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the court-room thereof, in the city of Los Angeles, on Tuesday, the 6th day of January, in the year of our Lord one thousand, nine hundred and fourteen. Present: The Honorable OLIN WELLBORN, District Judge.

No. A-101—EQUITY.

FRANK M. McKEY, Trustee, etc.,

Complainant,

vs.

ELI P. CLARK et al.,

Defendants.

On motion of George W. Dryer, Esq., of counsel for complainants herein, and good cause appearing therefor, it is ordered that the time within which complainants may file their amended bill of complaint be and the same hereby is extended ten (10) days. [9]

In the District Court of the United States, in and for the Southern District of California, Southern Division

FRANK M. McKEY, Trustee in Bankruptcy of the Estate of TOMLINSON-HUMES, INCORPORATED, Bankrupt,

Plaintiff,

vs.

ELI P. CLARK and LOS ANGELES WAREHOUSE COMPANY, a Corporation,

Defendants.

Amended Bill of Complaint in Equity.

To the Honorable OLIN WELLBORN, Judge of said Court:

Now comes Frank M. McKey, Trustee in Bankruptcy of the estate of Tomlinson-Humes, Incorporated, bankrupt, and pursuant to leave heretofore granted, files this his amended bill of complaint and for cause of action against the defendant herein complains and alleges:

I.

That heretofore on the 17th day of July, 1913, a petition was filed in the District Court of the United States in and for the Northern District of Illinois, Eastern Division, wherein and whereby it was prayed that Tomlinson-Humes, Incorporated, be adjudged bankrupt within the purview and meaning of the acts of Congress in that regard; that thereafter on the 30th day of July, 1913, an order was entered in said court adjudging said [10] Tomlinson-Humes,

Incorporated, to be bankrupt; that thereafter an order of general reference was entered in said court referring said cause to Frank L. Wean, Esq., one of the referees in bankruptcy of said court; that thereafter upon due notice, a general meeting of the creditors of said bankrupt was held on the 28th day of August, 1913, before said referee; that at said meeting said referee did duly appoint this plaintiff trustee in bankruptcy of said estate; that thereafter this plaintiff did duly qualify as such trustee under said order by filing his certain bond therein, and that an order was thereafter duly entered by said referee in said proceeding upon the 29th day of August, 1913, approving plaintiff's said bond as trustee; that plaintiff is a citizen of the United States, and a resident of the city of Chicago, Illinois.

II.

Plaintiff alleges that defendant Eli P. Clark is in possession and control of certain valuable assets and property of the estate of said bankrupt, to wit, twelve (12) oil paintings, reputed to be the work of one William Hogarth, sometimes collectively known as "Industry and Idleness Series," and further entitled and described as follows:

1. The Two Apprentices.
2. The Industrious Apprentice's Sunday Morning.
3. The Idle Apprentice's Sunday Morning.
4. The Industrious Apprentice Appointed Overseer.
5. The Idle Apprentice Sent to Sea.
6. The Marriage of the Industrious Apprentice.
7. Thomas Idle Returns from Sea.

8. Frank Goodchild Appointed High Sheriff. [11]
9. Tom Idle Betrayed by His Mistress.
10. Tom Idle Brought Before Alderman Goodchild.
11. The Execution of Thomas Idle.
12. Frank Goodchild Lord Mayor of London.

III.

That said bankrupt being then and there in actual possession of said twelve (12) paintings on or about the month of January, 1913, did cause said twelve (12) paintings to be exposed for inspection and offered for sale in the residence of one William Clark, in New York City, New York; that thereafter, on or about the 11th day of September, 1913, while said paintings continued to be the property of said bankrupt and subject to its orders, and while said property was in the custody of the District Court of the United States, in and for the Northern District of Illinois, Eastern Division, and subject to orders of said court, the said Eli P. Clark, defendant, without warrant or right, and by inducement, means and agency of a purported order from said bankrupt, which plaintiff is informed and thereupon alleges was false, fraudulent and forged, did direct said William Clark to deliver said twelve (12) paintings to defendant Eli P. Clark at Los Angeles, California, and in pursuance of said purported order said paintings were thereafter shipped to said Eli P. Clark at Los Angeles, California.

IV.

That said paintings were thereafter delivered to said Eli P. Clark and are now in his possession and control, and are, as plaintiff is informed and be-

lieves, stored and deposited in the rooms of the Los Angeles Warehouse Company, as agents and warehousemen for the said Eli P. Clark, in the said city of Los Angeles, California; that plaintiff since said delivery has [12] demanded possession of said twelve (12) paintings of and from said defendants, and each of them, but each of them has failed and refused, and still continue to fail and refuse to deliver said paintings or any of them to this plaintiff, and said paintings still continue in the possession and control of said defendants; that said Los Angeles Warehouse Company is a corporation duly organized, existing and acting under and by virtue of the laws of the State of California, having its principal place of business in the city of Los Angeles, California, and that said Eli P. Clark is a citizen of the United States, and resides at Los Angeles, California.

V.

That plaintiff as trustee of the estate of Tomlinson-Humes, Incorporated, is entitled to the possession of said twelve (12) paintings.

VI.

That William Hogarth the reputed author of said paintings is dead and that said paintings are of great peculiar and historic value and are unique and cannot be duplicated, and that their value is not readily susceptible of estimation, and that unless restrained by order of this Honorable Court the said defendants will cause or permit said twelve (12) paintings to be removed, altered, injured or carried away to parts

unknown to the great loss and injury of plaintiff and said estate, and that plaintiff is without other or adequate relief in the premises.

WHEREFORE, plaintiff prays that defendants be compelled to answer this amended bill within ten days from the filing hereof, but not under oath, their answer under oath being [13] expressly waived, and to abide and perform such order and decree in the premises as the Court shall deem proper and required by the principles of equity and good conscience, and that plaintiff may have a preliminary order restraining said defendants Eli P. Clark and Los Angeles Warehouse Company, and each of them, from assigning, alienating, removing, hypothecating, charging, altering or otherwise disposing of the said hereinbefore described property pending the issue of this action, and until final hearing herein, and until further order of this Court, and that upon a final hearing plaintiff may have a writ of injunction restraining said defendants Eli P. Clark and said Los Angeles Warehouse Company, and each of them, and their several agents, executors, administrators, attorneys and assigns, from selling, alienating, assigning, hypothecating, or otherwise disposing of, said twelve described oil paintings, or any part thereof, until the further order of this Honorable Court; that your Honor shall be pleased to order and decree an accounting by said defendants Eli P. Clark and Los Angeles Warehouse Company, and each of them, of the said matters and interests and assets, and that upon such accounting plaintiff shall be decreed to recover of and from said defendants such possession,

and such property and moneys as shall appear upon said accounting to be just and proper; that plaintiff may have an order and process directed to said defendants Eli P. Clark and Los Angeles Warehouse Company, a corporation, for possession of said paintings, or such part thereof as he shall appear to be entitled to; and for such other and further relief in the premises as to justice and equity shall appertain and to your Honor shall seem meet; and for plaintiff's costs herein expended.

MULFORD & DRYER,
WILBUR BASSETT,
Attorneys for Plaintiff. [14]

United States of America,
Northern District of Illinois,
Eastern Division,—ss.

On this 6th day of January, 1914, before me personally appeared Frank M. McKey, the plaintiff above named, who being by me duly sworn, deposes and says: That he is the trustee in bankruptcy of Tomlinson-Humes, Incorporated, bankrupt; that he has read the foregoing amended bill of complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

FRANK M. McKEY.

Subscribed and sworn to before me this 6th day of January, 1914.

[Seal] FRANK R. LEONARD,
Notary Public in and for the County of Cook, State of Illinois.

State of Illinois,
Cook County,—ss.

I, Robert M. Sweitzer, County Clerk of the county of Cook, DO HEREBY CERTIFY that I am the lawful custodian of the official records of notaries public of said county, and as such officer am duly authorized to issue certificates of magistracy, that Frank R. Leonard whose name is subscribed to the annexed Jurat, was, at the time of signing the same a notary public in Cook [15] County, duly commissioned, sworn and acting as such, and authorized to administer oaths and to take acknowledgments and proofs of deeds or conveyances of lands, tenements or hereditaments, in said State of Illinois, all of which appears from the records and files in my office; that I am well acquainted, with the handwriting of said notary, and verily believe that the signature to the said Jurat is genuine.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the county of Cook at my office in the city of Chicago, in the said county, this 6 day of Jan., 1914.

[Seal] ROBERT M. SWEITZER,
County Clerk.

[Endorsed]: Amended Bill of Complaint in Equity. No. A–101. Original. In the District Court of the United States, for the Southern District of California, Southern Division. Frank M. McKey, Trustee in Bankruptcy of the Estate of Tomlinson-Humes, Incorporated, Plaintiff, vs. Eli P.

Clark and Los Angeles Warehouse Comapny, a Corporation, Defendant. Received copy of within Amended Bill of Complt. in Equity this 12 day of January, 1914. Hartley Shaw. By A. M. S., Attorney for Defendant Clark.

E. W. Freeman, Defendant.

" " " L. A. Warehouse Co. Filed Jan. 12, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Mulford & Dryer and Wilbur Bassett, Suite 615 I. N. Van Nuys Building, Los Angeles, Cal., Attorneys for Plaintiff. Original. [16]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. A–101—In EQUITY.

FRANK M. McKEY, Trustee in Bankruptcy of the Estate of TOMLINSON–HUMES, INCORPORATED, Bankrupt,

Plaintiff,

vs.

ELI P. CLARK et al.,

Defendants.

Answer.

Now come Eli P. Clark and Los Angeles Warehouse Company, a corporation, defendants in the above-entitled case, and answer the amended bill of complaint herein, as follows:

I.

Said defendants admit that the defendant Eli P. Clark, is in possession and control of the paintings described in said bill, and that the same are stored and deposited in rooms of the defendant, Los Angeles Warehouse Company, as agent and warehouseman for the said defendant Eli P. Clark, and allege that said defendant Los Angeles Warehouse Company, claims no right, title or interest in said pictures, except as such agent and warehouseman.

II.

The defendants deny that any of the pictures described in said amended bill of complaint, is, or at any time has been, any part of the assets or property of the estate of Tomlinson-Humes, Incorporated, the bankrupt mentioned in said bill; and in [17] this connection, said defendants allege that each and every one of the said paintings is now, and ever since about the 11th day of May, 1912, has been the property of the defendant Eli P. Clark.

III.

Defendants admit that on or about the month of January, 1913, the said Tomlinson-Humes, Incorporated, was in the actual possession of the said twelve paintings, and did on or about said date, cause said paintings to be exposed for inspection and offered for sale in the residence of one William A. Clark, in New York City, New York. The defendants allege that the said Tomlinson-Humes, Incorporated, then and there had the possession of said paintings, solely as agent and representative of said defendant Eli P.

Clark, for the purpose of making a sale thereof, and subject at all times to his orders as owner thereof; and further allege that the said Tomlinson-Humes, Incorporated, were acting solely as agent for said defendant Eli P. Clark, in causing said paintings to be so exposed for inspection and offered for sale in the residence of said William A. Clark.

IV.

Defendants deny that at any time since said paintings were placed in the said residence of William A. Clark, or at any time since May 11th, 1912, any of said paintings has been the property of said Tomlinson-Humes, Incorporated, or has been subject to the order of said Tomlinson-Humes, Incorporated, except as said corporation had the custody thereof, or gave orders in regard thereto, for the purpose of making a sale of said paintings as the agent of defendant Eli P. Clark. The defendants further deny that said paintings, or any of the same, have at any time been in the custody of the District Court of the United States, in and for [18] the Northern District of Illinois, Eastern Division, or subject to the orders of said court in any manner; and further deny that the defendant Eli P. Clark, without warrant or right, directed the said William A. Clark to deliver said paintings or any of the same to the defendant Eli P. Clark at Los Angeles, California, or elsewhere. Neither of said defendants has actual knowledge of the manner in which said William A. Clark was directed to deliver said paintings to defendant Eli P. Clark, for the reason that said direc-

tions were given by an agent of the said Eli P. Clark, but on their information and belief, these defendants deny that said direction was given by inducement, means or agency, of any order or purported order from said Tomlinson-Humes, Incorporated, or of any order which was false, fraudulent or forged.

V.

These defendants deny that the plaintiff, as trustee of the estate of Tomlinson-Humes, Incorporated, or otherwise, is, or at any time has been, entitled to the possession of any of the said twelve paintings.

VI.

These defendants deny that unless restrained by this court they will cause or permit said paintings, or any of the same, to be removed, altered, injured or carried away to parts unknown, or at all, except that said Eli P. Clark, may cause the same to be removed to the custody of other warehousemen or agents, instead of said Los Angeles Warehouse Company, if he so desires. Defendants deny that by any removal, alteration, injury or carrying away of said pictures, any loss or injury would be caused to plaintiff or the estate of said bankrupt. Said defendants further deny that the plaintiff is without any or adequate relief in the premises, except an injunction. Defendants allege that [19] plaintiff as trustee of said bankrupt estate could in no case have any right in said pictures, or any property, except for the pecuniary value thereof, to be applied as a part of said bankrupt's estate for the payment of its debts, and that the defendant Eli P. Clark, is solvent and amply

able to respond in damages to any amount which might be determined to be the value of said pictures, in case this court should determine said pictures to be the property of said estate.

WHEREFORE, defendants pray that judgment in this case be entered in favor of the defendants, and that they have their costs from the plaintiff.

HARTLEY SHAW,
HERBERT J. GOUDGE,
Attorneys for Defendants.

State of California,
County of Los Angeles,—ss.

Eli P. Clark, being by me first duly sworn, deposes and says: That he is one of the defendants in the above-entitled action; that he has read the foregoing answer and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

ELI P. CLARK.

SUBSCRIBED AND SWORN TO before me this 19th day of January, 1914.

[Seal] A. I. SMITH,
Notary Public in and for the County of Los Angeles, State of California. [20]

[Endorsed]: Original. No. A–101—In Equity. In the District Court of the United States, Southern District of California, Southern Division. Frank M. McKey, Trustee in Bankruptcy, etc., Plaintiff, vs. Eli P. Clark, et al., Defendants. Answer. Filed Jan.

19, 1914. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Received copy of the within Answer this 19th day of January, 1914. Wilbur Bassett, Attorney for Plaintiff. G. E. Wilcox, Herbert J. Goudge and Hartley Shaw, 1024 Washington Building, Los Angeles, Cal., Attorneys for Defendants. [21]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. A–101—In EQUITY.

FRANK M. McKEY, Trustee in Bankruptcy of the Estate of TOMLINSON–HUMES, INCORPORATED, Bankrupt,

Plaintiff,

vs.

ELI P. CLARK et al.,

Defendants.

Notice of Application for Leave to Amend Answer and File Counterclaim.

To the Plaintiff Above Named, and to Messrs. Wilbur Bassett and Mulford & Dryer, His Attorneys:

You are hereby notified that the defendants will, on Monday, the 27th day of April, 1914, at 10:30 o'clock A. M. of said day, make application to the Court for leave to file an amended answer and counterclaim in the above-entitled action. A copy of said answer and counterclaim is served on you here-

with, and the said application will be made on the said proposed amended answer and counterclaim and on the records in the above-mentioned suit, and upon the ground that the defendants desire more fully to deny the allegations of the bill, and to set up the counterclaim above referred to.

HERBERT J. GOUDGE,
HARTLEY SHAW,
Attorneys for defendants.

[Endorsed]: Original. No. A–101—In Equity. In the District Court of the United States, Southern District of California, Southern Division. Frank M. McKey, Trustee, etc., Plaintiff, vs. Eli P. Clark et al., Defendants. Notice of Application for Leave to Amend Answer and File Counterclaim. Received copy of the within notice this 22 day of April, 1914. Wilbur Bassett & Mulford & Dryer, Attorneys for Plaintiff. Herbert J. Goudge, Hartley Shaw, 1024 Washington Building, Los Angeles, Cal., Attorneys for Defendants. Filed Apr. 24, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [22]

[Order Allowing Defendant to File Cross-Bill, and to Amend Answer, and Granting Motion for Injunction Pendente Lite, etc.]

At a stated term, to wit, the January term, A. D. 1914, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the

courtroom thereof, in the city of Los Angeles, on Friday, the 6th day of March, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable OLIN WELLBORN, District Judge.

No. A–101—EQUITY.

FRANK M. McKEY, etc.,

Complainant,

vs.

ELI P. CLARK et al.,

Defendants.

This cause coming on this day to be further heard on complainant's motion for the issuance herein of an injunction *pendente lite;* Wilbur Bassett, Esq., appearing as counsel for complainant; Hartley Shaw, Esq., appearing as counsel for defendants; and said motion having been further argued, in support thereof, by Wilbur Bassett, Esq., of counsel for complainant, during which argument Geo. W. Dryer, Esq., of counsel for complainant, comes into court; and the interrogatories and answers of Eli P. Clark, one of the defendants, heretofore filed herein, having been offered and admitted in evidence on this hearing; and said motion having been further argued, in opposition thereto, by Hartley Shaw, Esq., of counsel for defendants, it is ordered that said defendants be, and they hereby are granted twenty (20) days within which to file a cross-bill of complaint herein, with the right reserved to complainant to demur to said cross-bill or move to strike the same out, and it is further ordered, on like motion, that defendants be, and they

hereby are granted [23] twenty (20) days within which to amend their answer herein; and this cause having thereupon been submitted to the Court for its consideration and decision on complainant's said motion for the issuance of an injunction *pendente lite* and the oral argument of said motion; it is ordered that complainant's said motion for the issuance in this cause of an injunction *pendente lite* be, and the same hereby is granted as prayed for, to which ruling of the Court, on motion of defendants and by direction of the Court, exceptions are hereby noted herein on behalf of said defendants. Whereupon, on motion of Wilbur Bassett, an injunction *pendente lite* herein is signed and filed in open court. [24]

[Order Granting Application to Amend Answer, and Denying Application to File Counterclaim, etc.]

At a stated term, to wit, the January term, A. D. 1914, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the court-room thereof, in the city of Los Angeles, on Monday, the 4th day of May, in the year of our Lord one thousand, nine hundred and fourteen. Present: The Honorable OLIN WELLBORN, District Judge.

No. A–101—EQUITY.

FRANK M. McKEY, Trustee etc.,

Complainant,

vs.

ELI P. CLARK et al.,

Defendants.

This cause coming on to be heard on defendant's application for leave to amend their answer to the bill of complaint herein, and to file a counterclaim; Wilbur Bassett, Esq., appearing as counsel for complainant; Hartley Shaw, Esq., appearing as counsel for defendants; and said application having been presented by counsel, it is by the Court ordered that defendants' application for leave to amend their answer in the particulars set forth in said application be, and the same hereby is granted, and it is further ordered that the application of defendants for leave to file a counterclaim herein be, and hereby is denied, to which ruling of the Court, on motion of defendants and by direction of the Court, *on motion of defendants and by direction of the Court,* exceptions are hereby noted herein on behalf of said defendants. [25]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. A–101—IN EQUITY.

FRANK M. McKEY, Trustee in Bankruptcy of the Estate of TOMLINSON-HUMES, INCORPORATED, Bankrupt,

Plaintiff,

vs.

ELI P. CLARK et al.,

Defendants.

Amended Answer.

Now come the defendants, Eli P. Clark and Los Angeles Warehouse Company, a corporation, and file their amended answer to the amended bill of complaint herein, as follows:

I.

Said defendants admit that the defendant, Eli P. Clark, is in possession and control of the paintings described in said bill, and that the same are stored and deposited in rooms of the defendant, Los Angeles Warehouse Company, as agent and warehouseman for the said defendant, Eli P. Clark, and allege that said defendant, Los Angeles Warehouse Company, claims no right, title or interest in said paintings, except as such agent and warehouseman.

II.

The defendants deny that any of the pictures described in said amended bill of complaint, is, or at any time has been, [26] any part of the assets or

property of the estate of Tomlinson-Humes, Incorporated, the bankrupt mentioned in said bill; and in this connection, said defendants allege that each and every one of the said paintings is now, and ever since about the 11th day of May, 1912, has been the property of the defendant, Eli P. Clark.

III.

Defendants admit that on or about the month of January, 1913, the said Tomlinson-Humes, Incorporated, was in the actual possession of the said twelve paintings, and did on or about said date, cause said paintings to be exposed for inspection and offered for sale in the residence of Hon. William A. Clark, in New York City, New York. The defendants allege that the said Tomlinson-Humes, Incorporated, then and there had the possession of said paintings, solely as agent and representative of said defendant Eli P. Clark, for the purpose of making a sale thereof, and subject at all times to his orders as owner thereof; and further allege that the said Tomlinson-Humes, Incorporated, were acting solely as agent for said defendant Eli P. Clark, in causing said paintings to be so exposed for inspection and offered for sale in the residence of said William A. Clark; and on information and belief allege that said Tomlinson-Humes, Incorporated, then and there stated to said William A. Clark, that said paintings were the property of the defendant Eli P. Clark.

IV.

Defendants deny that at the time said paintings were removed from the said residence of William A.

Clark, or at the time such removal was directed, as set forth in paragraph III of said amended bill, any of said paintings was the property of said Tomlinson-Humes, Incorporated, or was subject to the order of said Tomlinson-Humes, Incorporated. The defendants further deny that said **[27]** paintings, or any of the same have at any time been in the custody of the District Court of the United States, in and for the Northern District of Illinois, Eastern Division, or subject to the orders of said Court, in any manner. Defendants further deny that the defendant Eli P. Clark, without warrant or right, directed the said William A. Clark to deliver said paintings or any of the same to the defendant Eli P. Clark at Los Angeles, California, or elsewhere. Neither of said defendants has actual knowledge of the manner in which said William A. Clark was directed to deliver said paintings to defendant Eli P. Clark, for the reason that said directions were given by an agent of the said Eli P. Clark, but on their information and belief, these defendants deny that said direction was given by inducement, means or agency, of any order or purported order from said Tomlinson-Humes, Incorporated, or of any order which was false, or forged.

V.

These defendants deny that the plaintiff, as trustee of the estate of Tomlinson-Humes, Incorporated, or otherwise, is, or at any time has been, entitled to the possession of any of the said twelve paintings.

VI.

These defendants deny that unless restrained by

this Court they will cause or permit said paintings, or any of the same, to be removed, altered, injured or carried away to parts unknown, or at all, except that said Eli P. Clark may cause the same to be removed to the custody of other warehousemen or agents, instead of said Los Angeles Warehouse Company, if he so desires. [28]

Defendants deny that by any removal, alteration, injury or carrying away of said pictures, any loss or injury would be caused to plaintiff or the estate of said bankrupt. Said defendants further deny that the plaintiff is without any or adequate relief in the premises, except an injunction. Defendants allege that the plaintiff as trustee of said bankrupt estate could in no case have any right in any of said pictures, except for the pecuniary value thereof, to be applied as a part of said bankrupt's estate for the payment of its debts, and that the defendant Eli P. Clark is solvent and amply able to respond in damages to any amount which might be determined to be the value of said pictures, in case this Court should determine said pictures to be the property of said estate.

WHEREFORE the defendants pray that the plaintiff take nothing by this action and the defendants recover their costs herein.

HERBERT J. GOUDGE,
HARTLEY SHAW,
Attorneys for Defendants.

State of California,
County of Los Angeles,—ss.

Eli P. Clark, being by me first duly sworn, deposes and says: That he is one of the defendants in the above-entitled action; that he has read the foregoing amended answer and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

ELI P. CLARK. [29]

Subscribed and sworn to before me this 13th day of May, 1914.

[Seal] GEO. H. CLARK,
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Original. No. A-101—In Equity. In the District Court of the United States, Southern District of California, Southern Division. Frank M. McKey, Trustee in Bankruptcy, etc., Plaintiff, vs. Eli P. Clark et al., Defendants. Amended Answer. Filed May 13, 1914. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Received copy of the within Amd. Answer this 22d day of April, 1914. Wilbur Bassett, Mulford & Dryer, Attorneys for Plaintiff. Hartley Shaw and Herbert J. Goudge, 1024 Washington Building, Los Angeles, Cal., Attorneys for Defendants. [30]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

FRANK M. McKEY, Trustee in Bankruptcy of the Estate of TOMLINSON-HUMES, Incorporated, Bankrupt,

Plaintiff,

vs.

ELI P. CLARK and LOS ANGELES WAREHOUSE COMPANY, a Corporation,

Defendants.

Preliminary Injunction.

WHEREAS, in the above-named cause it has been made to appear upon the verified bill of complaint filed herein, that a writ of injunction preliminary to the final hearing herein, is proper and that *prima facie*, the complainant is entitled thereto, enjoining the defendants herein from the acts complained of and threatened to be committed and due notice of application for such writ having been served upon defendants herein, and plaintiff and said defendants being each of them represented in open court pursuant to said notice, said defendants being heard, and the Court being advised in the premises and it appearing that plaintiff is a duly qualified and acting trustee in bankruptcy for the District Court of the United States for the Southern District of New York, and it further appearing that defendants should be enjoined and restrained from committing

the acts complained of and threatened to be committed,

NOW THEREFORE, it is ordered that the said Eli P. Clark and you the said Los Angeles Warehouse Company, a corporation, and each of you defendants herein, your agents, servants and attorneys, [31] and all persons acting or under your authority or direction be and you are hereby specially restrained and enjoined from selling, alienating, assigning, hypothecating or otherwise disposing of twelve oil paintings reputed to be the work of one William Hogarth, sometimes collectively known as "Industry and Idleness Series" and further particularly entitled and described as follows:

1. The Two Apprentices.
2. The Industrious Apprentice's Sunday Morning.
3. The Idle Apprentice's Sunday Morning.
4. The Industrious Apprentice Appointed Overseer.
5. The Idle Apprentice Sent to Sea.
6. The Marriage of the Industrious Apprentice.
7. Thomas Idle Returns from Sea.
8. Frank Goodchild Appointed High Sheriff.
9. Tom Idle Betrayed by His Mistress.
10. Tom Idle Brought Before Alderman Goodchild.
11. The Execution of Thomas Idle.
12. Frank Goodchild Lord Mayor of London.

until the trial of the issues herein and until the further order of this Court.

Dated at Los Angeles in said District this 6th day of March, 1914.

OLIN WELLBORN,
Judge.

[Seal] Attest, etc., WM. M. VAN DYKE,
Clerk U. S. District Court, Southern District of California.

By Leslie S. Colyer,
Deputy.

[Endorsed]: No. A–101—Eq. In the District Court of the United States for the Southern District of California, Southern Division. Frank McKey, Trustee in Bankruptcy of the Estate of Tomlinson–Humes Incorporated, Bankrupt, Plaintiff, vs. Eli P. Clark, and Los Angeles Warehouse Company, a Corporation, Defendants. Preliminary Injunction. Mulford & Dryer, Suite 615 Van Nuys Bldg. and Wilbur Bassett, Attorney at Law, 446 Title Insurance Building, F2486–Main 5804, Los Angeles, Cal., Attys. for Pltff. Filed Mar. 6, 1914. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk **[32]**

[Order Appointing Notary to Take Certain Depositions.]

At a stated term, to wit, the July term, A. D. 1914, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on Friday, the 17th day of July, in the year of our Lord

one thousand nine hundred and fourteen, Present: The Honorable OLIN WELLBORN, District Judge.

No. A–101—EQUITY.

FRANK McKEY, etc.,

Complainant,

vs.

ELI P. CLARK, et al.,

Defendants.

Pursuant to the stipulation of the parties hereto, by their solicitors of record, on file herein, it is ordered that E. Carl Tourje, Notary Public, of Chicago, Illinois, be, and he hereby is appointed, authorized and empowered to take the depositions of certain witnesses, at Chicago, Illinois, pursuant to said stipulation, for use upon final hearing in this cause. [33]

[Order That Cause be Stricken from Calendar for Further Hearing on Motion for Order Directing Issuance of a Commission to Take Depositions.]

At a stated term, to wit, the July term, A. D. 1914, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the court-room thereof, in the city of Los Angeles, on Friday, the 6th day of November, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable BENJAMIN F. BLEDSOE, District Judge.

No. A–101—EQUITY.

FRANK M. McKEY, as Trustee, etc.,

Complainant,

vs.

ELI P. CLARK,

Defendant.

This cause coming on this day to be further heard on a motion for an order directing the issuance of a commission herein for the taking of depositions; now, no counsel appearing on hebalf of either of the parties to this cause, and good cause appearing for such action, it is ordered that this cause be stricken from the calendar for said hearing. [34]

[Minutes, July 21, 1915—Final Hearing.]

At a stated term, to wit, the July term, A. D. 1915, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the court-room thereof, in the city of Los Angeles, on Wednesday, the 21st day of July, in the year of our Lord one thousand nine hundred and fifteen. Present: The Honorable OSCAR A. TRIPPET, District Judge.

No. A–101—EQUITY.

FRANK M. McKEY, as Trustee,

Complainant,

vs.

ELI P. CLARK et al.,

Defendants.

This cause coming on this day for final hearing in open court; George W. Dryer, Esq., and Wilbur Bassett, Esq., appearing as counsel for complainant; Hartley Shaw, Esq., and Herbert J. Goudge, Esq., appearing as counsel for defendants; H. H. Harris being present as shorthand reporter of the proceedings, and acting as such; and an opening statement of complainant's case having been made by Wilbur Bassett, Esq., of counsel for complainant; and an opening statement of defendants' defense having been made by Herbert J. Goudge, Esq., of counsel for defendants, and a further statement of complainant's case having been made by Wilbur Bassett, Esq., of counsel for complainant; and complainant having offered an exhibit, which is admitted in evidence in its behalf, to wit, Compls. Ex. 1, memorandum of dates involved herein; and portions of depositions taken on behalf of complainant and on file herein having been read to the Court by [35] Wilbur Bassett, Esq., of counsel for complainant; and Court, at the hour of 11:01 o'clock, A. M., having taken a recess for 4 minutes; and now, at the hour of 11:05 o'clock, A. M., Court having reconvened; and counsel and shorthand reporter being present as before; and the reading of the aforesaid depositions on behalf of complainant having been resumed and continued by Wilbur *Wilbur* Bassett, Esq., and George W. Dryer, Esq., of counsel for complainant; and Court, at the hour of 12 o'clock, M., having taken a recess until the hour of 2 o'clock, P. M., of this day;

And now, at the hour of 2 o'clock, P. M., Court having reconvened; and counsel and shorthand re-

porter being present as before; and the reading of the aforesaid depositions on behalf of complainant having been resumed and continued by Wilbur Bassett, Esq., of counsel for complainant; it is, at the hour of 4:30 o'clock, P. M., ordered that this cause be, and the same hereby is continued until Thursday, the 22d day of July, 1915, at 10 o'clock, A. M. **[36]**

[Minutes, July 22, 1915— Final Hearing, Resumed.]

At a stated term, to wit, the July term, A. D. 1915, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the court-room thereof, in the city of Los Angeles, on Thursday, the 22d day of July, in the year of our Lord one thousand nine hundred and fifteen. Present: The Honorable OSCAR A. TRIPPET, District Judge.

No. A–101—EQUITY.

FRANK M. McKEY, as Trustee, etc.,

Complainant,

vs.

ELI P. CLARK et al.,

Defendants.

This cause coming on this day for further proceedings and orders on final hearing in open court; George W. Dryer, Esq., and Wilbur Bassett, Esq., appearing as counsel for complainant; Hartley Shaw, Esq., and Herbert J. Goudge, Esq., appearing as counsel for defendants; H. H. Harris being present as shorthand reporter of the testimony and

proceedings, and acting as such; and Wilbur Bassett, Esq., of counsel for complainant, having resumed and concluded the reading to the Court of depositions heretofore taken and filed herein on behalf of complainant, and having also read to the Court the interrogatories propounded to complainant to defendant Clark and said defendant's answers thereto, heretofore filed in this cause, and all depositions herein having been offered and admitted in evidence, subject to such objections as have been made thereto; and all of the depositions heretofore filed herein having been offered and received [37] in evidence subject to objection made at the taking thereof; and complainant having rested; and E. P. Clark, one of the defendants, having been called and sworn as a witness on behalf of defendants, and having given his testimony; and defendants having rested; and Court, at the hour of 11:19 o'clock, A. M., having taken a recess for 5 minutes; and now, at the hour of 11:25 o'clock, A. M., Court having reconvened; and counsel and shorthand reporter being present as before; and said cause having been argued on behalf of complainant by Wilbur Bassett, Esq., of counsel for complainant; and Court, at the hour of 12 o'clock, P. M., *Court* having taken a recess until the hour of 2 o'clock, P. M., of this day;

And now, at the hour of 2 o'clock, P. M., Court having reconvened; and counsel and shorthand reporter being present as before; and, after the transaction of certain business in a criminal cause, this cause having been further argued, on behalf of complainant, by Wilbur Bassett, Esq., of counsel for

complainant, and on behalf of defendants by Herbert J. Goudge, Esq., of counsel for defendants, and on behalf of complainant in reply by Wilbur Bassett, Esq., of counsel for complainant; it is ordered that this cause be, and the same is submitted to the Court for its consideration and decision on the pleadings and proofs and the argument of said cause, the Court indicating that a decision will be rendered herein on Monday, July 26th, 1915, at 10 o'clock, A. M. [38]

[Order That Bill of Complaint be Dismissed, etc.]

At a stated term, to wit, the July term, A. D. 1915, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the court-room thereof, in the city of Los Angeles, on Monday, the 2d day of August, in the year of our Lord one thousand nine hundred and fifteen. Present: The Honorable OSCAR A. TRIPPET, District Judge.

No. A–101—EQUITY.

FRANK M. McKEY, as Trustee, etc.,

Complainant,

vs.

ELI P. CLARK et al.,

Defendants.

George W. Dryer, Esq., and Wilbur Bassett, Esq., appearing as counsel for complainant; Herbert J. Goudge, Esq., appearing as counsel for defendants; H. H. Harris being present as shorthand reporter of

the proceedings; this cause having heretofore been submitted to the Court for its consideration and decision on the pleadings and proofs; the Court, having duly considered the same and being fully advised in the premises, now orally announces its conclusions, and it is ordered that the bill of complaint be dismissed, a decree accordingly to be prepared by counsel for defendants and submitted for the Court's action on Tuesday, the 3d day of August, 1915, at 10 o'clock, A. M. [39]

[Order Staying Effect and Operation of Decree Until September 8, 1915.]

At a stated term, to wit, the July term, A. D. 1915, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the court-room thereof, in the city of Los Angeles, on Thursday, the 5th day of August, in the year of our Lord one thousand nine hundred and fifteen. Present: The Honorable OSCAR A. TRIPPET, District Judge.

No. A–101—EQUITY.

FRANK M. McKEY, Trustee, etc.,

Complainant,

vs.

ELI P. CLARK et al.,

Defendants.

Wilbur Bassett, Esq., and Geo. W. Dryer, Esq., appearing as counsel for complainant; Herbert J. Goudge, Esq., appearing as counsel for defendants;

a proposed final decree herein having been presented in open court, and said counsel for complainant having made application for the withholding of the Court's action thereon, and said application having been argued, on behalf of complainant, by Wilbur Bassett, Esq., of counsel for complainant, and on behalf of defendants by Herbert J. Goudge, Esq., of counsel for defendants; and Court having, at the hour of 2:55 o'clock, P. M., taken a recess for 20 minutes; and now, at the hour of 3:15 o'clock, P. M., Court having reconvened; and counsel being present as before; said decree is now signed and filed and directed to be entered, and it is by the Court ordered that the effect and operation of said decree be stayed until the 8th day of September, 1915. Said decree is as follows:

* * * * * * * *

(Omitted here, as it appears in copy of enrolled papers.) [40]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

FRANK M. McKEY, Trustee in Bankruptcy of the Estate of TOMLINSON-HUMES, INCORPORATED, Bankrupt,

Plaintiff,

vs.

ELI P. CLARK and LOS ANGELES WAREHOUSE COMPANY, a Corporation,

Defendants.

Decree.

This cause came on to be heard at this term and was argued by counsel for the respective parties, and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, to wit:

I.

That the preliminary injunction heretofore granted in the above-entitled cause whereby the defendants and each of them were restrained from selling, assigning, alienating, hypothecating, or otherwise disposing of the twelve paintings in the bill of complaint herein described, until the final hearing and determination of the issues in said cause, be and the same is hereby dissolved.

II.

That the plaintiff take nothing by this action, and the [41] plaintiff's bill herein be and the same is hereby dismissed, and that the defendants recover their costs herein.

DONE in open court this 5th day of August, 1915.

OSCAR A. TRIPPET,
Judge.

Decree entered and recorded August 5, 1915.

WM. M. VAN DYKE,
Clerk.
By Leslie S. Colyer,
Deputy Clerk.

[Endorsed]: Original. A–101—Eq. In the District Court of the United States, in and for the Southern District of California, Southern Division. Frank M. McKey, Trustee in Bankruptcy of the

Estate of Tomlinson-Humes, Incorporated, Bankrupt, Plaintiff, vs. Eli P. Clark and Los Angeles Warehouse Company, a Corporation, Defendant. Decree. Filed Aug. 5, 1915. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. [42]

[Order that Injunction Remain in Force Until September 10, 1915.]

At a stated term, to wit, the July term, A. D. 1915, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the court-room thereof, in the city of Los Angeles, on Tuesday, the 7th day of September, in the year of our Lord one thousand nine hundred and fifteen. Present: The Honorable OSCAR A. TRIPPET, District Judge.

No. A–101—EQUITY.

FRANK M. McKEY, Trustee, etc.,

Complainant,

vs.

ELI P. CLARK et al.,

Defendants.

On motion of Wilbur Bassett, Esq., of counsel for complainant, it is ordered that the injunction heretofore issued herein be and remain in full force and effect until Friday, the 10th day of September, 1915, in the forenoon of said day. [43]

[Order Continuing Cause Until September 20, 1915.]

At a stated term, to wit, the July term, A. D. 1915, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the court-room thereof, in the city of Los Angeles, on Friday, the 10th day of September, in the year of our Lord one thousand nine hundred and fifteen. Present: The Honorable OSCAR A. TRIPPET, District Judge.

No. A–101—EQUITY.

FRANK M. McKEY, Trustee, etc.,

Complainant,

vs.

ELI P. CLARK et al.,

Defendants.

Good cause appearing therefor, at the request of counsel, it is ordered that this cause be, and the same hereby is continued until Monday, the 20th day of September, 1915, for the presentation of papers concerning an appeal herein for the Court's action thereon. [44]

[Order Entered September 20, 1915, Continuing Hearing on Settlement of Statement on Appeal for One Week.]

At a stated term, to wit, the July term, A. D. 1915, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the court-room thereof, in the city of Los Angeles, on Monday, the 20th day of September, in the year of our Lord one thousand nine hundred and fifteen. Present: The Honorable OSCAR A. TRIPPET, District Judge.

No. A–101—EQ.

FRANK M. McKEY, Trustee, etc.,

Complaniant,

vs.

ELI P. CLARK et al.,

Defendants.

This cause coming on at this time to be heard upon the settlement of the statement of complainant on appeal herein; Wilbur Bassett, Esq., appearing as counsel for complainant, and Hartley Shaw, Esq., and Herbert J. Goudge, Esq., appearing as counsel for defendants; and proposed amendments to the proposed statement on appeal having been filed herein in open court on behalf of defendants, and this cause having been argued in support of the application of complainant for settlement of the statement on appeal heretofore filed herein by Wilbur Bassett, Esq., of counsel for complainant, and in

opposition thereto by Hartley Shaw, Esq., of counsel for defendant; and further in support thereof by Wilbur Bassett, Esq., of counsel for complainant, it is thereupon ordered that this cause be, and the same hereby is continued one (1) week for said hearing. [45]

[Order Entered September 27, 1915, Continuing Hearing on Settlement of Statement on Appeal for One Week.]

At a stated term, to wit, the July term, A. D. 1915, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the court-room thereof, in the city of Los Angeles, on Monday, the 27th day of September, in the year of our Lord one thousand nine hundred and fifteen. Present: The Honorable OSCAR A. TRIPPET, District Judge.

No. A–101—EQUITY.

FRANK M. McKEY, Trustee, etc.,

Complainant,

vs.

ELI P. CLARK et al.,

Defendants.

This cause coming on this day to be heard on settlement of statement on appeal; now, on motion of Hartley Shaw, Esq., of counsel for defendants, and no counsel appearing on behalf of complainants, it is ordered that this cause be, and the same hereby is continued one (1) week for said hearing. [46]

[Minutes, October 4, 1915—Re Order Approving and Certifying Statement on Appeal, etc.]

At a stated term, to wit, the July term, A. D. 1915, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the court-room thereof, in the city of Los Angeles, on Monday, the 4th day of October, in the year of our Lord, one thousand nine hundred and fifteen. Present: The Honorable OSCAR A. TRIPPET, District Judge.

No. A-101—EQUITY.

FRANK M. McKEY, as Trustee, etc.,

Complainant,

vs.

ELI P. CLARK et al.,

Defendants.

This cause coming on this day to be heard on a settlement of a statement on appeal herein; and a statement on appeal pursuant to the stipulation by and between counsel for the respective parties at the foot thereof, having been presented to the Court by Wilbur Bassett, Esq., of counsel for complainant, an order approving and certifying said statement on appeal is signed in open court, and said statement on appeal so allowed by the Court, is thereupon filed.

Thereafter, at the afternoon session of the court, an order allowing appeal and restraining the injunction heretofore issued herein and continuing the same in force until the further order of the Court

and fixing the amount of bond on appeal, is signed and filed in open court. Said order allowing appeal, etc., is as follows, viz:

* * * * * * * * *

(Omitted here, as same appears elsewhere in this transcript.) [47]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

FRANK M. McKEY, Trustee in Bankruptcy of the Estate of TOMLINSON-HUMES, INCORPORATED, Bankrupt,

Plaintiff,

vs.

ELI P. CLARK and LOS ANGELES WAREHOUSE COMPANY, a Corporation,

Defendants.

Statement of Appeal.

The said cause came on regularly for trial in the above court, before Honorable Oscar A. Trippet, Judge thereof, on the 21st day of July, 1915, and was duly heard upon the merits, plaintiff being represented by Wilbur Bassett, Esq., and Messrs, Mulford & Dryer, and the defendants being represented by Herbert J. Goudge, Esq., and Hartley Shaw, Esq., and at said trial the following evidence was introduced, and the following proceedings were had:

[Deposition of Herbert O. Tomlinson.]

The deposition of Herbert O. Tomlinson was read, as follows:

I was formerly treasurer and general manager of Tomlinson-Humes, Incorporated. I was connected with that company from its organization in December, 1911. I know Thomas Myers of Buffalo, and am acquainted with the circumstances of the negotiations for the purchase of the Hogarth pictures from him. Those pictures first came into our possession in February, 1912. They were shipped to us from New York, March 15, 1912, on instructions from Mr. Myers. [48]

The pictures were received by the bankrupt and were held in our stock-room for some weeks, and shipped to Buffalo early in May of the same year, in such a way that they could be claimed by Mr. Humes and myself when we went there. There were present in Buffalo at that time Mr. Humes, Mr. McArdle and myself, and present at some of the interviews, Mr. Myers, Miss Myers, his daughter and Mr. Spaulding, his attorney. Mr. Burnett was also there one day.

I was general manager for the concern. The business of the art department was in charge of Mr. Humes. After my return to Chicago from Buffalo the pictures were returned to Chicago in a few days, and were in our possession for some months in Chicago. They were later shipped to Akron where they remained several weeks. They were returned to our rooms in Chicago and a few weeks later shipped to New York to Seymour J. Thurber; he was

then in the employ of the bankrupt and they were shipped to him in that capacity, for the purpose of exhibiting them with the expectation of selling them. Tomlinson-Humes did not, that I know of, at any time after these pictures were shipped to Mr. Thurber in New York, authorize Mr. Thurber or any one to deliver these paintings to Eli P. Clark, defendant in this case.

I believe negotiations between our corporation and Mr. Myers, prior to the 15th of March, 1912, resulted in the execution of a document or contract signed by Mr. Humes on the part of our company, and by Mr. Myers. I have seen the document. I do not know where it is now. I have not seen it for a long time. To the best of my recollection it was signed late in the summer or early in the autumn of 1911. There was a letter from Mr. Myers stating that he had ordered the paintings shipped to us. It was dated March 13, 1912. When we received that letter [49] I recognized the pictures referred to in it as the pictures covered by the contract between Mr. Myers and Tomlinson-Humes, Incorporated.

We went to Buffalo, N. Y., in the early part of May, 1912. I was accompanied by Mr. Humes and Mr. McArdle. We had the first negotiations in Mr. Spaulding's office in Buffalo. Mr. Bennett reached Buffalo the next day after that. I knew Mr. Bennett as the nephew and agent of Mr. E. P. Clark of Los Angeles. There were two instruments executed in Buffalo. One of them was a bill of sale from Thomas Myers to Tomlinson-Humes,, Incorporated, marked Defendants' Exhibit 2.

[Defendants' Exhibit No. 2—Bill of Sale.]

KNOW ALL MEN BY THESE PRESENTS, THAT, We, Thomas Myers, individually and as sole legatee under, and Beatrice A. Myers, individually and as sole executrix of, the Last Will and Testament of Sarah Ann Myers, both of Buffalo, Erie County, New York, parties of the first part, for and in consideration of the sum of Two ($2.00) Dollars, lawful money of the United States, to them in hand paid, at or before the ensealing and delivery of these presents and other good and valuable consideration to them made by Tomlinson-Humes, Incorporated, of Chicago, Cook County, Illinois, of the second part, the receipt whereof is hereby acknowledged, have bargained and sold, and by these presents do grant and convey unto the said party of the second part, its successors and assigns the following named and described fourteen reputed original paintings to be by the respective Artists, as follows, viz:

The Industrious and Idle Apprentices Series, by William Hogarth, comprising the following, namely:

1. "The Two Apprentices."
2. "The Industrious Apprentice's Sunday Morning."
3. "The Idle Apprentice's Sunday Morning."

[50]

4. "The Industrious Apprentice Appointed Overseer."
5. "The Idle Apprentice Sent to Sea."
6. "The Marriage of the Industrious Apprentice."
7. "Thomas Idle Returns from Sea."

8. "Frank Goodchild Appointed High Sheriff."
9. "Tom Idle Betrayed by His Mistress."
10. "Tom Idle Brought Before Alderman Goodchild."
11. "The Execution of Thomas Idle."
12. "Frank Goodchild Lord Mayor of London."

The Vale of Tempe, reputed original painting by J. M. W. Turner and The Fete of Champetre reputed original painting by Jean Antoine Watteau.

TO HAVE AND TO HOLD the same unto the said party of the second part its successors and assigns forever. And we do covenant to and with the said party of the second part that we are the owners and have the right to sell and transfer the said property, and will defend the same against any person or persons whomsoever claiming the same.

IN WITNESS WHEREOF, we have hereunto set out hands and seals the 11th day of May, in the year one thousand nine hundred and twelve.

THOMAS MYERS, (L. S.)

Individually and as Sole Legatee Under the Last Will and Testament of Sarah Ann Myers, Deceased.

BEATRICE A. MYERS, (L. S.)

Individually and as Sole Executrix of the Last Will and Testament of Sarah Ann Myers, Deceased.

[51]

State of New York,
County of Erie,
City of Buffalo,—ss.

On this 11th day of May in the year one thousand nine hundred and twelve before me, the subscriber,

personally appeared Thomas Myers, individually and as sole legatee of the last will and testament of Sarah Ann Myers, deceased, Beatrice A. Myers, individually and as executrix of the last will and testament of Sarah Ann Myers ,deceased, and Thomas Myers, to me personally known to be the same persons described in and who executed the foregoing instrument, and they severally acknowledged to me that they executed the same.

[Seal] WILLIS M. SPAULDING,
Notary Public, Erie Co., N. Y. [52]

The other document was a bill of sale from Tomlinson-Humes, Incorporated, to Eli P. Clark, marked Defendants' Exhibit 3.

[Defendants' Exhibit No. 3—Bill of Sale.]

KNOW ALL MEN BY THESE PRESENTS, THAT the undersigned Tomlinson-Humes, Incorporated of Chicago, Cook County, Illinois, of the first part, for and in consideration of the sum of two ($2.00) Dollars, lawful money of the United States to it in hand paid, at or before the ensealing and delivery of these presents and other good and valuable considerations to it made by E. P. Clark of Los Angeles, California, of the second part, the receipt whereof is hereby acknowledged, has bargained and sold, and by these presents does grant and convey unto the said party of the second part, his executors, administrators and assigns under and subject to the terms of sale contained in agreement of March 28, 1912, between the parties hereto and pursuant to the sale therein contained the following described paint-

ings reputed to be originals by the respective artists following, namely:

The Industrious and Idle Apprentices Series, by William Hogarth, comprising the following namely;

1. "The Two Apprentices."
2. "The Industrious Apprentice's Sunday Morning."
3. "The Idle Apprentice's Sunday Morning."
4. "The Industrious Apprentice Appointed Overseer."
5. "The Idle Apprentice Sent to Sea."
6. "The Marriage of the Industrious Apprentice."
7. "Thomas Idle Returns from Sea."
8. "Frank Goodchild Appointed High Sheriff."
9. "Tom Idle Betrayed by his Mistress." **[53]**
10. "Tom Idle Brought Before Alderman Goodchild."
11. "The Execution of Thomas Idle."
12. "Frank Goodchild Lord Mayor of London."

The Vale of Tempe, original painting by J. M. W. Turner; The Fete of Champetre, original painting by Jean Antoine Watteau.

TO HAVE AND TO HOLD THE same unto the said party of the second part, his executors, administrators and assigns forever, and it does covenant to and with the said party of the second part that it is the owner nad has the right to sell and transfer the said property, and will defend the same against any person or persons whomsoever claiming the same.

IN WITNESS WHEREOF said Tomlinson-Humes, Incorporated, has caused its name to be sub-

scribed by its president and sealed with its seal the 11th day of May, in the year one thousand nine hundred and twelve.

TOMLINSON-HUMES, Inc.
By W. Y. C. HUMES,
Its President.

In presence of:
E. J. McARDLE. [54]

After these papers were executed, they were delivered to Mr. Bennett then and there. My recollection is the papers were finally signed in the La Fayette Hotel, in the room of Mr. Humes or myself. We had adjoining rooms and Mr. McArdle also had one adjoining. They opened into each other.

Q. At the time these documents were delivered to Mr. Bennett was the actual physical possession of the paintings turned over to him?

A. I believe it was.

Mr. McArdle, who is now interrogating me upon the taking of this deposition, was the same person who accompanied me on that trip to Buffalo.

Q. Did he not at that time, acting under your instructions, have instructions and directions to see that these things were properly transferred and delivered to Mr. Bennett for Mr. Clark? A. Yes.

The writing on the bill of sale from Tomlinson-Humes to Clark, Exhibit 3, is in Mr. McArdle's handwriting; the signature is Mr. Humes'. The writing is as follows:

"Received from Henry C. Bennett agent for E. P. Clarke assignee in above bill of sale the paintings

(Depositions of Herbert O. Tomlinson.)

therein assigned to hold the same under the terms of the contract of March 28th, 1912, therein referred to, the possession being delivered in the Lafayette Hotel, Buffalo, *Buffalo,* N. Y., after the paintings had been identified by Mr. Thomas Myers mentioned in said contract of March 28th, 1912.

Dated this 11th May, 1912.

TOMLINSON–HUMES, Inc.,
By W. Y. C. HUMES,
Prest." **[55]**

I presume I read that document at the time. It refers to an agreement of March 28th, 1912. That original document was present in Buffalo at the time these documents, Exhibits 2 and 3 were delivered to Mr. Bennett.

Thereupon Defendants' Exhibit 4 attached to the depositions was introduced in evidence, being a contract dated March 28, 1912, between Tomlinson-Humes, Incorporated, and E. P. Clark. Said exhibit is as follows:

[Defendants' Exhibit No. 4—Contract.]

"MEMORANDA OF AGREEMENT, Made and entered into this Twenty-eighth day of March, Nineteen Hundred and Twelve, by and between the following parties, viz:

TOMLINSON–HU*GH*ES, INCORPORATED, of Chicago, Cook County, Illinois, first party, and

ELI P. CLARK, of Los Angeles, Los Angeles County, California, second party.

WHEREAS first party now has an option on fourteen (14) certain paintings from Thomas Myers, of

Buffalo, New York, and second party hereby agrees to purchase same from first party, and

WHEREAS said fourteen (14) paintings are listed and described as follows:

Twelve (12) paintings by William Hogarth, known as "Industry and Idleness" Series consisting of the following paintings and bearing the following titles:

1. The Two Apprentices.
2. The Industrious Apprentice's Sunday Morning.
3. The Idle Apprentice's Sunday Morning.
4. The Industrious Apprentice Appointed Overseer.
5. The Idle Apprentice Sent to Sea.
6. The Marriage of the Industrious Apprentice.
7. Thomas Idle Returns from Sea. **[56]**
8. Frank Goodchild Appointed High Sheriff.
9. Tom Idle Betrayed by his Mistress.
10. Tom Idle Brought Before Alderman Goodchild.
11. The Execution of Thomas Idle.
12. Frank Goodchild Lord Mayor of London.

Price named for above twelve paintings in option above referred to $50,000.

One painting known as "The Vale of Tempe"—J. M. W. Turner.

Price in option above referred to $25,000.

One painting known as "Fete Champetre"—Jean Antoine Watteau. Price in option above referred to $4,000.

AND WHEREAS first party have in their possession by reason of their option from Mr. Myers, certain newspaper clippings; copies of letters; copy of

(Deposition of Herbert O. Tomlinson.)

a receipt to Mr. Thomas Myers for Twelve Thousand Pounds(£12,000), the original price paid by him for the twelve Hogarths; books, catalogs, and other documents bearing upon the history and authenticity of the above-described fourteen paintings; and

WHEREAS first party has an agreement with the said Thomas Myers to turn over the original letters and receipt in so far as they now exist, to first party, first party in turn will turn over to second party the original documents received from the said Thomas Meyers on which the proof of the authenticity of said fourteen paintings is based, and such documents shall be attached hereto and made a part of this agreement.

These original documents mentioned above are to be the same as the copies now pasted in a scrapbook bound in yellow paper covers and now in the possession of the first party.

WHEREAS second party hereby engages the services of first party, from March 28, 1912, to July 28, 1914, to resell such [57] paintings for him at a profit, and in order that first party may be compensated for their services in discovering these paintings and presenting this option to second party and for the work which they will be expected to do and for the expenses to which they will be put by reason of this undertaking as provided for herein in preparing a campaign for a resale of said paintings as provided for herein and for properly preparing them for such resale, second party hereby purchases from first party above named fourteen

(Deposition of Herbert O. Tomlinson.)

paintings and each and every one of them, (paying them a profit over and above their option price from the said Tmomas Myers) for a total price of $125,-000, and contemporaneously herewith makes payment for such paintings with four (4) promissory notes of Thirty-one Thousand Two Hundred Fifty Dollars ($31,250) each, with interest from date at the rate of six (6) per cent per annum, and due respectively January 28, 1913, July 28, 1913, January 28, 1914 and July 28th, 1914, due and payable at the National Produce Bank of Chicago, Illinois. It being understood that second party allows first party to make the profit represented by the difference between the price which they have to pay Mr. Myers and the purchase price herein named, by reason of the provisions hereinafter contained which make it obligatory upon first party to stand all expenses in handling a resale of said paintings without charge to second party, and for the further reason that second party is to have the expert services of the first party and their organization for the resale of these paintings.

It is further understood that if first party can obtain any concession by way of commission or reduction in price from said quoted option price from the said Thomas Myers, they are to have the same as compensation for their work in bringing the matter [58] to the attention of second party and of disposing of them for Mr. Myers.

THIS AGREEMENT further witnesseth that second party, in consideration of the premises and of

(Deposition of Herbert O. Tomlinson.)

the mutual agreements herein contained, employs first party as his agents and brokers from March 28, 1912, to July 28, 1914, and first party hereby accepts this employment and agrees to serve second party as brokers and agents in the sale and disposition of said paintings.

1. First party is to have the exclusive right and interest in all of said paintings to sell and dispose of said paintings and each of them, except that the Twelve Holgarths must be sold as a whole, and first party has no right to sell one or any number of them less than the whole separately without the written consent of second party.

2. First party shall not have the right to sell, without the written consent of the second party, any of said fourteen paintings at prices less than those set opposite each as per the following list and prices:

Twelve Hogarths, to be sold as one $480,000
"Vale of Tempe" Turner..... 200,000
"Fete Champetre" Watteau.. .. 200,000

3. In case of a sale or sales, the first moneys received from such sale or sales are to be applied to the payment of the said four notes of $31,250 each and interest at six per cent per annum, until said four notes are entirely paid and returned to second party so marked.

4. Until a sale or sales have been made to the extent of $125,000 and accrued interest on said four notes of $31,250 [59] each, no compensation shall be due from second party to first party for any efforts, time or expense to which first party may have

(Deposition of Herbert O. Tomlinson.)

gone by reason of their efforts to make resales of said paintings.

5. When first party has made a sale or sales aggregating $125,000 and accrued interest on said four notes of $31,250 each, to date of sale, if such sale or sales are in excess of said $125,000 and accrued interest to date of sale, then the first party is to be entitled to fifty (50) per cent of such excess as commission in compensation of their work and efforts in connection with the paintings and the sale or sales.

6. After first party shall have made a sale or sales of sufficient amounts to turn over to second party $125,000 and accrued interest to date of sale or sales, then first party is to be entitled to fifty (50) per cent of all future sales which may be made of any or all of such paintings as may remain on hand from the original fourteen described herein.

7. Second party has the right within thirty (30) days after the expiration of one year from this date, to withdraw from sale any or all of said fourteen paintings by payment to first party of ten (10) per cent of the minimum selling price of such painting or paintings as hereinbefore provided, viz., ten per cent of $480,000 for the withdrawal of the twelve Hogarths, and ten (10) per cent of $200,000 for the withdrawal of "The Vale of Tempe"—Turner, and ten (10) per cent of $200,000 for the withdrawal of the "Fete Champetre"—Watteau.

It is understood, however, that no one or more of

the Hogarths less than the total number may be withdrawn.

But, it is understood that if at any time prior to the exercise of this right of withdrawal, first party has referred **[60]** to second party an offer of sale to *second party* of any or all of said fourteen paintings at a price or prices lower than the fixed minimum selling price as hereinbefore provided, and such offer has been rejected by second party as being too low an offer for such painting or paintings, then second party in pursuance of his right of withdrawal as provided for in this clause, shall only be required to pay ten (10) per cent of the amount of the rejected offer for the withdrawal of any painting or paintings covered by such rejected offer. It is understood, however, that no one or more of the Hogarths less than the total number may be withdrawn.

8. At any time that a sale is made of the twelve Hogarths, or either of the other two pictures, second party has the right, within thirty (30) days after such sale, to withdraw any remaining paintings from sale by giving first party written notice of such withdrawal within thirty (30) days from date of sale, by payment to first party of ten (10) per cent of the minimum selling price of said painting or paintings as hereinbefore provided, it being understood, however, that no one or more, less than the whole of the twelve Hogarths, can be withdrawn under the provisions of this clause.

9. It is understood that if second party does not avail himself of the above-described rights to with-

draw any painting from sale within thirty days (30) after the expiration of one year from this date, when the paintings at that time on hand shall remain in the hands of first party exclusively for a period of one year from that date under the provisions of this agreement.

10. If at the time of any sale, second party does not avail himself of his right, under the terms of this agreement as hereinbefore provided, to withdraw from sale any or all paintings **[61]** remaining on hand, then such paintings remaining on hand shall be left exclusively in the hands of first party for sale under the terms of this contract, for one year from date of such sale, or until the expiration of this contract, if one year from date of such sale would operate to extend the selling rights of first party beyond the expiration of this contract.

11. At the expiration of this contract on July 28, 1914, second party shall have the right to withdraw from sale and from the hands or agency of first party without any payment of any nature whatever to first party for commissions, bonuses, or for any labor or expense in connection with said paintings, undergone by first party, all paintings unsold.

12. First party agrees to exercise their best efforts to resell said paintings and each of them at or in excess of the minimum prices as hereinbefore provided.

13. First party are to pay, without charge to second party, all costs and expenses of handling, caring for and keeping of said paintings and making resale

thereof, including payment of commissions to salesmen or agents. First party are also to pay all fees, without charge to second party, to experts for work done in connection with the authentication and looking up and writing the history of said paintings. First party are also to pay, without charge to second party, all of their railroad fares, hotel bills, and other expenses in connection with the handling and reselling of said paintings.

14. First party is to keep said paintings insured in the name of said second party to an amount not less than Two Hundred Fifty Thousand ($250,000) Dollars, and first party is to pay without charge to second party premiums on such insurance.

15. If at any time during the life of this contract, any or all of said paintings should be destroyed by fire or otherwise, **[62]** and if, for such damage or less, insurance moneys are collected in excess of $125,000, such excess of said $125,000 is to be divided equally between first and second parties, the intent being that all insurance policies shall be in the name of, and the loss payable to, second party; but in case of a loss, when second party has received from the insurance companies his original investment of $125,000 that any amount in excess of said $125,000, he is to pay half of such excess to first party to compensate them for their work and efforts prior to such fire or loss.

16. First party is hereby clothed with full power and authority to sell all of said pictures and each and every one of them as hereinbefore provided, and to assign, transfer and deliver the same on making

sale or sales and to receive and receipt for the purchase price thereof and to make all reasonable and necessary provision for their safe keeping, exhibition and insurance.

17. Unless said four notes of $31,250 each, with accrued interest, be sooner paid by second party, first party is to apply the purchase price received on sales until said four notes of $31,250 each, and accrued interest, are, paid in full, and when all are fully paid, then first party is to pay the balance of any moneys received, less their commissions, to second party, as hereinbefore provided.

18. First party are, at their expense and without charge to second party, to clean and fully restore all fourteen of said paintings and if necessary, reframe any or all of them which may require it.

This clause is to be applied to any paintings which may be withdrawn by second party as well as any which may be resold by first party. [63]

19. This agreement is to be binding upon the executors, administrators, successors and assigns of the parties hereto.

IN WITNESS WHEREOF the parties aforesaid have, the day and year first above written, executed these presents and duplicate thereof.

TOMLINSON-HUMES, INCORPORATED.

(Signed) W. Y. HUMES, (Seal)

Its President.

(Signed) E. P. CLARK. (Seal) [64]

The deposition of said witness was read as follows:

All of the pictures were present in the rooms at the

La Fayette Hotel. Mr. Myers and Miss Myers were there. After Mr. Myers and Miss Myers left, Mr. Bennett or Mr. Bennett and Mr. Humes went about immediately to arrange to have the pictures placed in the vault of the hotel for safety.

To the best of my recollection, these pictures were shipped by us to Mr. Thurber in New York, in January or February, 1913. Mr. Thurber was there in New York. Mr. Thurber was associated with our corporation in March, 1912, at the time this contract, Defendants' Exhibit 4 was executed. Mr. Thurber had no connection with our own business other than the art department prior to this bankruptcy.

[Deposition of H. O. Tomlinson in Behalf of Defendants.]

The same witness, H. O. TOMLINSON, also gave his deposition in behalf of the defendants at the taking of said deposition, and his deposition so given was read in evidence as follows:

A letter shown me marked "Defendants' Exhibit 7," dated April 10, 1912, from Tomlinson-Humes to Clark, is signed by Mr. Humes. **[65]**

[Defendants' Exhibit No. 7—Letter April 10, 1912.]

TOMLINSON-HUMES, INCORPORATED.

Capital $100,000.00

Old Masters, Modern Paintings and Marbles.

Largest Book Brokers in the World.

Imported and DeLuxe Editions.

Libraries bought and sold.

Chicago Office:—431 S. Dearborn Street.

Chicago, April 10, 1912.

Mr. Eli P. Clark,
637 Consolidated Realty Bldg.,
Los Angeles, Calif.

Dear Mr. Clark:

I arrived in Chicago yesterday noon and immediately communicated with Mr. Bennett over the telephone. He had already talked to Mr. Tomlinson.

Mr. Bennett said, that he would prefer to make the trip to Buffalo next week as he was very busy this week. Inasmuch as it will take us several days to make our financial arrangements to pay Mr. Myers, it rendered it convenient for all parties to await Mr. Bennett's pleasure, and Mr. Bennett and I purpose going to Buffalo next week.

I shall take our attorney with us to see that the transfer of title is properly made, and we will use every precaution to fully protect your interests in the matter and see that you get a clear and perfect title to the paintings.

I learned on my arrival here, that Mr. Tomlinson,

during my stay in Los Angeles, had had Mr. Myers ship the paintings to Chicago, and they are here now in our possession. Mr. [66] Tomlinson had already advised Mr. Bennett of this, and we told him that we would be glad to have him come over and look at them at his convenience. We have not, of course, the original documents which Mr. Myers is under contract to deliver to us, bue we will obtain them when we go to Buffalo to make payment to him of the purchase price.

We are making great plans for a successful campaign for selling these paintings for you. As soon as we can get these detailed matters adjusted, I will take Mr. Thurber with me to Huntsville to meet Mrs. Scott. We shall take pleasure in keeping both you and Mr. Bennett in close touch with the progress we make from time to time.

With kind regards and best wishes we are

Yours very truly,

TOMLINSON–HUMES, INCORPORATED

Per W. Y. C. HUMES, Pres.

WYCH/AMK.

Another letter shown me, marked Defendants' Exhibit 8, from Tomlinson-Humes, Incorporated to E. P. Clark, is signed by Mr. Humes.

[Defendants' Exhibit No. 8—Letter, May 3, 1912.]

(On letter-head of Tomlinson-Humes, Incorporated.)

Chicago, May 3, 1912.

Mr. Eli P. Clark,
637 Consolidated Realty Bldg.,
Los Angeles, Calif.

My dear Mr. Clark:

* * * * * * * * *

[67]

We have obtained sufficient money on your paper to pay Mr. Myers, but the bankers, who took this paper, are very careful and rigid about the red tape and detail of their business. They are perfectly satisfied as to your financial standing, but they insisted upon sending two of the notes to Los Angeles merely to have you identify your signature. Therefore, two of these notes will be shown you, and all that is required is for you to say that you signed them. I am sorry that you even have to be bothered to this extent, and I am sending this letter to by special delivery so that you will receive this explanation before anyone shows you these notes. There will be no further inquiry as to your credit, as that is undoubted here, but they simply wish your signature verified by you.

We are leaving tonight for the East to make payment to Mr. Myers. We will have the transfer of the pictures made in a manner which will satisfy both Mr. Bennett and our attorney.

You may rest assured, Mr. Clark, that we are going to give all of your matters our very best atten-

tion, and we have strong hopes of speedy and satisfactory results.

Yours very truly,
TOMLINSON–HUMES, INCORPORATED,
Per*y* W. Y. C. HUMES,
Prest.

WYCH/AMK.

We received the four notes of Mr. Clark referred to in the contract, exhibit 4, prior to the trip to Buffalo. It is my recollection that the notes were attached as collateral to the Tomlinson-Humes note. I think the Tomlinson-Humes note was given for practically the face value of the two notes, so we realized $62,500 on those. We had a part of this money with us when we went to Buffalo. Mr. Humes and Mr. McArdle accompanied me to [68] Buffalo. Mr. McArdle went as the attorney of Tomlinson-Humes. He received instructions before we started on the train. Mr. Humes made the arrangements. I knew when we started that Mr. Bennett was to come to Buffalo. We told Mr. Bennett that Mr. McArdle was going along, that there were some matters regarding the title of the paintings that we wanted Mr. McArdle to look into, and as soon as he was satisfied that everything was all right and we were in shape to close the deal, we would wire Mr. Bennett that he should come up. Mr. Bennett was wired and reached Buffalo next day after we did.

A letter shown me, marked Defendants' Exhibit 9, addressed to Eli P. Clark, is signed by Mr. Humes.

The following passage from said letter was then read in evidence:

[Defendants' Exhibit No. 9—Letter, May 14, 1912. (Part of).]

"Buffalo, N. Y., May 14, 1912.

Mr. Eli P. Clark,
S. W. Corner 6th & Hill Sts.,
Los Angeles, Cal.

My dear Mr. Clark:

Your favor of the 7th inst was forwarded to me here and I note contents with much interest. I evidently did not make myself clear in my former letter to you regarding the notes. We did obtain the money on the notes through Mr. Wakem the gentleman whom I first mentioned to you and he handled the notes on the former deal for us. In this deal Mr. Wakem wished to take in some associates with him and these associates were bankers. While Mr. Wakem was perfectly satisfied in regard to the authenticity of your signature, they *n* insisted out of an abundance of caution that these particular notes should be verified. It was *must* against my wishes that we had to annoy you **[69]** in the matter, but it was beyond my control. We did not offer your notes to anyone but Mr. Wakem.

Mr. Bennett was here with me on Saturday when we made the transfer of the pictures from Mr. Myers to us and from us to you, and he will no doubt write you fully about it. We had our Chicago attorney accompany us here and used every precaution to protect our interest and yours in the two

transfers. We had them file a certified copy of the will of Sarah Ann Myers with us showing that all her property both real and personal had been willed to her husband, Mr. Thomas Myers. We had the transfer papers signed both by Mr. Thomas Myers, as the legatee and also individually, and by his daughter Beatrice Myers who was the executrix of her mother's estate. Miss Beatrice Myers signing both as the executrix and personally.

We also had the records searched here to see if there were any claims, judgment or chattel mortgages against Mr. Myers, and our attorneys pronounce the transfers from Mr. Myers to us and from us to you perfect ones so far as the titles are concerned. * * * " **[70]**

The WITNESS. — (Continuing.) Defendants' Exhibit 13 shown to me is a letter signed by Mr. Humes addressed to Clark under date of February 24, 1913, in which they say that their plan is at present to show the pictures in Senator Clark's private art gallery in New York.

When in Buffalo in May, 1912, we put up at the La Fayette Hotel and were assigned to three adjoining rooms, communicating with each other. Defendants' Exhibit 2, the bill of sale from Myers to Tomlinson-Humes, Incorporated, was signed in Mr. Spaulding's office; this or a copy was given to Mr. Bennett and Tomlinson-Humes had one also. Defendants' Exhibit 3, the bill of sale from Tomlinson-Humes to Clark, I think was signed in the La Fayette Hotel after Mr. Myers and his daughter and attorney

reached the hotel. We made the exchanges with Mr. Myers and his daughter of the consideration that was to be paid there for those pictures in Mr. Spaulding's office. It might have been at the hotel. It is my recollection that everything was completed at the office of the attorney, unless it might have been the actual transfer of the papers. I am inclined to think there was some formality gone through in the hotel room before we met Mr. Bennett. Just what that was, I am not clear. Miss Myers, Mr. Myers, Mr. McArdle, Mr. Humes and myself came from the office of Mr. Spaulding to the hotel.

When the petition in bankruptcy was filed against Tomlinson-Humes, Incorporated, all business of the Art and De Luxe Sales Department stopped.

When we came to the La Fayette Hotel, we went first into one of the rooms at the end of the suite. The pictures were in the center room. We went in there first, and Mr. Bennett was waiting in the other room, and we had some formalities in there [71] that Mr. Bennett was not in on, and I am inclined to think that the papers were transferred there. Everything was prepared at Mr. Spaulding's office and the transfer of the papers was made between Mr. Myers and Tomlinson-Humes after we got over to the La Fayette Hotel, and then when we were fixed up between us, we passed into the other room and Mr. Bennett was introduced to Mr. Myers and Miss Myers and Mr. Spaulding. I believe these papers were all passed to Mr. Bennett. Mr. Myers went over each one of those pictures and identified them to Mr.

Bennett. The pictures were transferred right there to Mr. Bennett.

Plaintiff here moved to strike out the last statement of the witness as a conclusion, which motion was denied by the court.

The WITNESS. — (Continuing.) When Mr. Myers and the rest of us came into the room where Mr. Bennett was, they were introduced, and Mr. McArdle said, "Now Mr. Myers I want you to go over these paintings and identify them to Mr. Bennett." Mr. Bennett had been introduced as a representative of Mr. Clark in the purchase, and Mr. Myers with a good deal of ceremony went over each picture one by one, saying "This Mr. Bennett is so and so," and so right through the list. Mr. Bennett set about arranging for the storing of the paintings that night. I think that the room that the pictures were in at the time was my room. I surrendered it shortly after this and left in an hour or two to come to Chicago.

Q. Do you know to whom that room was assigned when you surrended it?

Objected to by plaintiff as a leading question, and objection overruled by the court.

A. I think Mr. Bennett took that room. [72]

WITNESS.—(Continuing.) When I left, the pictures were in the room and that room was turned over to Bennett.

[Deposition of Seymour J. Thurber.]

The deposition of SEYMOUR J. THURBER, was read in evidence by the plaintiff as follows:

I was a salesman in the art department of Tomlinson-Humes about two years previous to the bank-

(Deposition of Seymour J. Thurber.)

ruptcy. I was in their employ in January, 1913. I first saw the Hogarth pictures at the Ehrich Art Galleries in New York. I think it was in the summer previous to the winter we went out to the coast and concluded the sale of the paintings to E. P. Clark. I then said they were genuine pictures and wanted Tomlinson-Humes to buy them. We found out who the owner was and went to Thomas Myers and began negotiations to secure an option. After an option was obtained the pictures were taken to Chicago and put in the hands of our restorer under my directions. We then went to the coast to Los Angeles and sold them to Mr. E. P. Clark.

After the pictures were reframed, they were exhibited privately in the art rooms of the bankrupt. They were not directly offered for sale. When they were sold to Mr. Clark they were finally sold to him. They were not shipped to Los Angeles. I was present at the negotiations with Mr. Clark. The contract was signed in Mr. Clark's office, in Los Angeles, California, and his contract he kept, an dthe other contract Mr. Humes took with him back to Chicago. We arranged to go down to Buffalo to see Mr. Myers to conclude the option which had been obtained previous to our going to the coast. I don't know where the Myers' option is. The pictures were shipped to Chicago after the option was concluded. Tomlinson-Humes were authorized to sell them under the terms of the option.

When I returned from Los Angeles the pictures were still in Chicago. They were afterwards, about

(Deposition of Seymour J. Thurber.)

October, 1912, shipped to [73] Akron, Ohio, and offered for sale, and then shipped back to Chicago in December. The next shipment was to New York, about the first of March, 1913. I think that they were delivered to Senator Clark's residence, 77th and Fifth Avenue, and then unpacked by me personally and taken upstairs by me and placed in one of Senator Clark's art galleries. About two weeks after that, which would be sometime in April, possibly around the first of April, they were taken down out of the art gallery and repacked by me in their cases in which they had originally been shipped. I asked Mr. Rowcroft, who was superintendent of Mr Clark's residence, if I could leave them there for further shipping directions, and he said that would be all right as far as he was concerned. I showed the pictures to Senator Clark and tried to sell them to him. I took the pictures downstairs and repacked them. I did not get them back after that. I wrote Mr. Rowcroft to deliver these pictures on my written order only. I think a copy of that letter is in the files of Tomlinson-Humes, Incorporated.

Q. Did you subsequently at any time authorize, or did Tomlinson-Humes Company to your knowledge authorize, the removal of these pictures from the residence of Senator Clark? A. No, sir.

Q. Now referring to the time when you say these pictures were received from Ehrich, New York, in March, 1912, did these pictures remain continuously in the possession of the bankrupt up to the time that they were moved from the residence of Senator

(Deposition of Seymour J. Thurber.)

Clark. A. Yes, sir. [74]

WITNESS.—(Continuing.) At Mr. Bennett's request, at his office, and in the presence of my attorney, Mr. Samuel B. Hill, I wrote a letter ordering the pictures to be shipped, but on the advice of Mr. Hill I did not sign or send the letter.

On cross-examination witness further testified:

I saw the document which I called an option obtained from Mr. Myers whenever I wanted to. When I wanted to see it I asked Mr. Humes for it and he got it out of the Tomlinson-Humes files. When it was in Chicago it was kept in the safe of the corporation. The last time I saw it that I recall was in Akron, Ohio, in December, 1912. I was not with those pictures during all of the period from the time in March that they were shipped from the Ehrich Galleries, up to the time that they were removed from the residence of Senator Clark. I was with them the greater part of that time; I cannot give you the dates. I know where the pictures were from March, 1912, until they were removed from Senator Clark's residence, because I was in constant touch with the affairs of the company during that period. I cannot answer positively where they were on the 11th of May. I never saw them in Buffalo. The first time that I visited Senator Clark's residence in relation to those Hogarth pictures was about the first of April, 1913, when I went there to unpack them. Shortly after that I took them off the walls and repacked them. They were not on the walls of Senator Clark's art rooms at any time. They were in the

(Deposition of Seymour J. Thurber.)

gallery on chairs and on the floor. I think they were there about three days. They were delivered at Senator Clark's about a day before I unpacked them.

I do not know whether I have copies of any of the letters I wrote to Mr. Rowcroft. Some of them I mailed myself, I don't know how many. Those that were written in the office I did not [75] mail. I suppose there were one or two of those. I don't know their dates. I wrote to Mr. Rowcroft demanding the pictures from him. I am one of the petitioners in bankruptcy for the adjudication of Tomlinson-Humes, Incorporated, as a bankrupt.

On redirect examination, the witness testified:

That option from Mr. Myers authorized the bankrupt to make a conveyance of these pictures, if sold.

[Deposition of Michael Gesas.]

The deposition of MICHAEL GESAS taken by stipulation of the parties was read in evidence by the plaintiff as follows:

I am one of the attorneys for the plaintiff in these proceedings. On September 19, 1913, I called at Senator Clark's home, and met Mr. Rowcroft. Mr. McKey, the plaintiff, was with me at that time. I stated to Mr. Rowcroft that Mr. McKey was trustee in bankruptcy in the matter of Tomlinson-Humes, Incorporated, and produced certified copy of the approval of Mr. McKey's bond by the Court, and said, in behalf of Mr. McKey, "I demand that the Hogarth paintings which were delivered here by Mr. Thurber be turned over to Mr. McKey forthwith, as trustee in bankruptcy in the Tomlinson-Humes

(Deposition of Michael Gesas.)

matter." Mr. Rowcroft said that on September 11, 1913, he had received instructions from Mr. Anderson, Senator Clark's secretary, that the pictures were to be given to E. P. Clark, Sixth and Hill Streets, Los Angeles, California, and in pursuance of that direction he shipped the pictures by the American Express Company.

I then had a talk with Mr. Anderson and repeated to him the fact that I represented Mr. McKey, the trustee, and introduced Mr. McKey to him and made formal demand on him for the return of the pictures. He stated he had received a letter purporting to be signed by Mr. Thurber—did not know Mr. Thurber's [76] signature, and he said when he received the letter he thought it was genuine and instructed Mr. Rowcroft to ship the pictures to Eli P. Clark, at Sixth and Hill Streets, Los Angeles, California.

I saw the letters referred to by Mr. Rowcroft. The name of Seymour J. Thurber, or S. J. Thurber, was subscribed to it. I have seen Mr. Thurber's signature several times. Making a comparative analysis of both signatures I would say the signature to that letter was not the signature of Mr. Thurber.

[Deposition of Harry L. English.]

The deposition of HARRY L. ENGLISH, taken by stipulation in behalf of the plaintiff, was read by the plaintiff as follows:

I was in the employ of Tomlinson-Humes at the time of the bankruptcy. I started in May, 1912. I first saw the Hogarths in their place of business the first day I went there. In a short time we packed

(Deposition of Harry L. English.)

them and shipped them to Buffalo. They were returned from Buffalo, and in a few days I started the restoration and framing of them. It took a long time. Then I packed them again and shipped them to Akron, Ohio. They were down there two or three months. I went down there and packed them and expressed them back to Chicago. They then remained in our possession quite a while. The next shipment was to New York. I expressed them there to S. J. Thurber, care of the American Express Company.

I can fix the date of my first employment with Tomlinson-Humes as May 1, 1912. The Hogarths then were just on stretchers with no frames and were quite dirty. Nothing had been done to them before they were shipped to Buffalo in the way of cleaning, repairing, reframing or anything of that kind. [77]

[Deposition of Henry C. Bennett.]

The deposition of HENRY C. BENNETT, taken at Chicago, Illinois, in behalf of the defendants by stipulation of the parties, was read in evidence by the plaintiff:

I reside at Evanston, Illinois. Eli P. Clark is my uncle. I have represented him in deals for paintings with the firm of Tomlinson-Humes & Company in two deals. I first learned about the Myers collection by letters from Mr. Clark. Tomlinson-Humes said they were arranging for the negotiations of some notes with which to raise the money necessary to purchase these paintings from Mr. Myers, and as soon as they were ready they would let me know. I

(Deposition of Henry C. Bennett.)

received a telegram from them to come on to Buffalo. I reached there Saturday morning, May 11th. I went immediately to the Hotel La Fayette and asked them if they were ready for me, and they said no, they had some matters to fix up with Mr. Myers' attorney and did not know just what hour they would be ready. Later in the day they advised me that they would be ready about one o'clock.

They occupied three connecting rooms with ouen doors. The pictures were scattered around the room there, the middle room. They were all the pictures involved in the transaction, including the Hogarths. At one o'clock I met Mr. Myers and his daughter and was introduced to them as Mr. Clark's representative who was purchasing these pictures. Mr. Myers' attorney, Mr. Spaulding, was there at the time, also Mr. Humes, Mr. Tomlinson and Mr. McArdle. As soon as I was introduced to Mr. Myers I asked him to identify these paintings to me, and he went around to each one of them, told me what they were and told me something of their history. After that the deeds and papers, title papers, were all turned over and I took possession of them. This was done in the same room with the pictures, all right there together. [78]

Prior to the papers being turned over, Mr. Myers, Miss Myers and their attorney, Mr. Humes, Mr. Tomlinson and Mr. McArdle returned to one of the other rooms of that suite; then they all came in to the room together with Mr. McArdle and the papers were turned over to me. The papers turned over to

(Deposition of Henry C. Bennett.)

me were Defendants' Exhibits 2, 3, 15, 16 and 17. At that time I said I wanted to make some arrangements for storing the paintings that evening, and went down to the clerk's office, Mr. Tomlinson and Mr. Humes were with me. We arranged to store the paintings in the vault of the hotel.

After I returned from the clerk's office, Mr. Tomlinson advised me that he and Mr. McArdle were going back to Chicago that evening, and I stated that I was going to leave early Sunday morning, and I would turn the paintings over at that time and I wanted a receipt for them, for the paintings. A receipt was then drawn on the bottom of the bill of sale to Mr. Clark and signed. That receipt appears on the bottom of Defendants' Exhibit 3.

When I went to the clerk's office I took the room occupied by Mr. Tomlinson, the middle room, for myself. The pictures were in that room.

I know a man named Rowcroft in New York. The document shown me marked Defendants' Exhibit 18 is a letter which I received from him. It is as follows:

[Defendants' Exhibit No. 18, September 11, 1913.]

"Residence of W. A. Clark,
New York, September 11th, 1913.

Mr. H. C. Bennett,
c/o Mead & Coe,
69 Washington Street, Chicago. [79]

Dear Sir:

I am forwarding via the American Express to-day three cases that were packed by your Mr. Thurber

(Deposition of Henry C. Bennett.)

to Mr. Eli P. Clark, corner 6th and Hill Sts., Los Angeles, Cal. I trust they will arrive there safe and thank you for giving me the information where to send them.

Very truly yours,

W. M. ROWCROFT,"

Prior to receiving that letter I had made a communication with Mr. Rowcroft in writing.

I know Mr. Thurber and have known him two or three years. He told me, about April or May, 1913, that the pictures had been taken to Mr. Clark's residence for the purpose of exhibiting them to him in order to make a sale, and they were left in charge of the superintendent of his gallery, Mr. Rowcroft; that he, Thurber, said to Rowcroft that those pictures belonged to Mr. E. P. Clark of California.

About two weeks before I wrote to Mr. Rowcroft this letter of the 8th of September, Thurber made another statement to me on that subject.

Cross-examination.

Mr. Rowcroft was acting for Senator Clark in relation to these pictures. I did not deal with anybody else in New York acting for Senator Clark. After these pictures were received by Mr. Rowcroft for Senator Clark, I did not have any written communication with Mr. Rowcroft or Senator Clark or any one else representing Senator Clark other than the letters which I have identified here. [80]

[Depositions of Frank McKey.]

Thereupon the deposition of FRANK McKEY, taken in behalf of defendant at Chicago, Illinois, was read as follows:

(Deposition of Frank McKey.)

I am the plaintiff. I never at any time authorized, directed or consented to or empowered anyone in my behalf to authorize, direct and consent to the delivery of the Hogarth pictures described in this action, to Eli P. Clark or anyone else.

Thereupon the deposition of the same witness, taken in behalf of the plaintiff was read as follows:

I first learned that these Hogarth pictures had passed out of the possession of Senator Clark or his agents, when I was in New York in the latter part of September, 1913. We made a demand for the pictures from Senator Clark's housekeeper and he claimed they had been shipped to Mr. Clark in California. Rowcroft was the housekeeper and he told me he had boxed up the pictures and sent them by express to E. P. Clark. I made a demand on him the night I saw him in the basement of the Clark house.

[Deposition of Edward J. McArdle.]

The deposition of EDWARD J. McARDLE, taken at Chicago, was then read in evidence at follows:

Mr. Hume came to my office in the law suite of McArdle & McArdle, and asked me if I could accompany himself and Mr. Tomlinson to Buffalo to assist in closing an art transaction. He said to me, "Last March I made a contract with my friend Mr. Clark, of whom you have heard, in Los Angeles, and we are going down to Buffalo to complete that transaction and I wish you to represent us as well as to see that Mr. Clark's interests are fully protected. Mr. Clark expects us to do this for him,

(Deposition of Edward J. McArdle.)

for I have so told him." I then asked him what the nature of the transaction was, and he said that was the matter that he wanted to call my attention to **[81]** particularly, but he would give me all the facts. He showed me Defendants' Exhibit 4, and called my attention to the clause on page 3 of it: "It is further understood that if first party can obtain any consideration by way of commission or reduction in price from said quoted option price from the said Thomas Myers, they are to have the same as compensation for their work in bringing the matter to the attention of second party and of disposing of them for Mr. Myers." He said in view of that clause we do not wish that Mr. Myers know that we have a purchaser for the art works mentioned in this contract with Mr. Clark, and particularly I do not wish that there should be a transfer direct from Mr. Myers to Mr. Clark. We believe we can obtain from Mr. Myers a substantial concession from the price quoted in this option contract that I showed you.

I had already read the contract, Defendants' Exhibit 4, and I thereupon took the option contract which he showed me and read it. That contract said that it authorized Tomlinson-Humes, Incorporated, to sell those *picuters*, and I believe that it also stated that Tomlinson-Humes, Incorporated, had the right to purchase the pictures at the prices quoted, which prices I do not now remember. He asked me how the transaction could be carried out so as to vest the title absolutely in Mr. Clark without disclosing to Mr. Myers the name of Mr. Clark. I said the only

(Deposition of Edward J. McArdle.)

way that that could be done was to have Mr. Myers, after he had fixed the terms of his deal with them, make a bill of sale, and Tomlinson-Humes execute a similar bill of sale to Mr. Clark, and make delivery of it. He told me in this same interview that Mr. Bennett would be on to represent Mr. Clark in the closing of the deal and that there was one thing particularly that Mr. Clark desired, and that was [82] that Mr. Bennett should be present and Mr. Myers should identify all of those paintings.

Mr. Humes, Mr. Tomlinson and I went to Buffalo, putting up at the La Fayette Hotel, occupying each a room in a series of three, the middle room, looking out through the windows, was occupied by Mr. Tomlinson, the one to the left by me and the one to the right by Mr. Humes. My room was nearest the elevator. After arriving in Buffalo, we met Mr. Myers and his daughter at the office of his attorney, Mr. Spaulding. Then we took up the question of obtaining by Tomlinson-Humes, Incorporated, a reduction in price named in the contract between Mr. Myers and Tomlinson-Humes, Incorporatd. When that was done I investigated the title as shown by the papers they produced. Amongst them were Defendants' Exhibits 15, 16 and 17. Those negotiations covered two or three interviews. I believe we made a couple of visits to our rooms and I found on one of the earlier visits that fourteen pictures had been placed in the middle room occupied by Mr. Tomlinson.

We were in Buffalo a day before the papers were

(Deposition of Edward J. McArdle.)

finally executed, sometime during the forenoon of the day after we arrived there, and on the same day the papers were signed Mr. Bennett came to the rooms. I was introduced to him, or he to me, as Mr. Clark's nephew or representative. Mr. Humes said that Mr. Clark understood that he was to have me for his attorney to look after Mr. Clark's interest, and that he was desirous to have Mr. Bennett present when Mr. Myers would identify those pictures. It was then stated that it would be arranged that Mr. and Miss Myers and their attorney would come to the hotel, identify the pictures and the deal would be closed right then and there, and [83] the pictures turned over and the possession given to Mr. Bennett for Mr. Clark.

We then went to Mr. Spaulding's office again; where eventually Tomlinson-Humes, the two Myers and Mr. Spaulding had arranged the question of price and other details and papers were drawn up, amongst them Defendants' Exhibit 2. The question then came up as to how the property should be placed in Mr. Clark, and we had drawn up Defendants' Exhibit 3. I believe there were some other papers drawn up. Exhibit 17 was produced at the time, and Exhibits 15 and 16 were prepared while these negotiations were going on. When everything was ready, an appointment was made by which the parties were to meet in Mr. Humes' room. We came over from the office; by arrangement Mr. Bennett was there. Mr. Myers and Miss Myers were introduced to Mr. Bennett, and I think it was after

(Deposition of Edward J. McArdle.)

we entered Mr. Humes' room in the suite that Mr. Myers identified those pictures to Mr. Bennett. About this I am not sure. Mr. Myers, Miss Myers, Mr. Tomlinson and myself entered Mr. Humes' room and Mr. Humes turned over to Mr. Myers and his daughter and attorney, the money and notes. Mr. Myers, his attorney and daughter turned over Defendants' Exhibits 2, 15, 16 and 17. Possibly there were some other papers. To these were then attached Defendants' Exhibit 3, which had already been signed by Mr. Humes, and we left the room. Mr. Bennett was in the adjoining room where the pictures were. Mr. Myers identified them to him, going to one after another, stating where he got them and giving a short history of each picture; then these papers, Defendants' Exhibits 2, 3, 15, 16 and 17 were delivered to Mr. Bennett.

Mr. Bennett was told by either Mr. Humes or myself, there were the pictures now, for him to take possession of, that they were his. [84]

Then the Myers and their attorney left, and a discussion arose between Mr. Humes and Mr. Bennett and Mr. Tomlinson about the protection of those pictures over night. We all left the room, Tomlinson and myself to surrender our rooms and get our transportation for home that night, and Mr. Humes and Mr. Bennett to arrange for the pictures. When we returned I learned that Mr. Tomlinson had surrendered his room just as I had, and Mr. Bennett was assigned to Mr. Tomlinson's room where these pictures were located. I then sat down and after

(Deposition of Edward J. McArdle.)

the witness clause I wrote upon it this receipt, which now appears on it, on Defendants' Exhibit 3. When I had completed my writing Mr. Humes signed in the place where it now appears. We were then right in the room with the pictures. This took place on the afternoon of the 11th, and Mr. Tomlinson and myself left and came home.

[Deposition of James H. Anderson.]

Thereupon the deposition of JAMES H. ANDERSON, taken in New York, was read in evidence as follows:

I have been secretary to Senator William A. Clark fourteen years. Have charge of his correspondence and in charge of his office in New York. In 1913 W. H. Rowcroft was in charge of the Senator's mansion in New York. A letter produced by me is a copy of the letter written by Senator Clark to Professor Chattain under date of February 26, 1913. Said letter is as follows: **[85]**

[Exhibit—Letter, February 26, 1913, W. A. Clark to A. Chattain.]

"Butte, Montana, February 26th, 1913.

Professor A. Chattain,

629 Woodland Park, near 35th Street,

Chicago, Illinois.

Dear Sir:

I am in receipt of your valued favor of the 21st instant from New York and note what you say about the pictures by Hogarth and that Mr. Turner has a letter of introduction to me from Mr. E. P. Clark of

Los Angeles, owner of the same. I note your suggestions.

I expect to leave to-night for New York and will take a look at these at the earliest opportunity.

Yours sincerely,

W. A. CLARK."

I cannot identify the letter I showed to Mr. Gesas or Mr. McKey when they visited me. I did not make a note of it at the time. I did show them a telegram from Mr. Clark of Los Angeles, which said telegram is produced by me and dated September 11th, 1913.

Plaintiff objected to this telegram as being subsequent to the adjudication in bankruptcy.

[Exhibit—Telegram, September 10, 1913, E. P. Clark to Senator W. A. Clark.]

"Form 2589 B

FX

Western Union Day Letter.

Theo. N. Vail, President, N 520.

Received at the Western Union Building, 195 Broadway, N. Y. **[86]**

Sept. 10, 1913.

Y 3454 CH DNM 50 BLUE Received 367

Sep 11 1913 550

Ans. 1394

5432

Senator Wm A. Clark 20 Ex. Place.

New York.

Dear Senator Will you please instruct Mr. Row-

croft to comply with Mr. H. C. Bennets request to have the twelve Hogarth paintings now in your gallery properly packed and expressed to me as they belong to me. Mr. Bennet is my nephew. Whatever the expense is will send my draft.

E. P. CLARK. 511 P. M.

Witness also produced and identified a letter from H. C. Bennett to W. H. Rowcroft, dated September 8th, 1913, which letter is as follows:

[Exhibit—Letter, September 8, 1913, H. T. Bennett to W. H. Rowcroft.]

"Chicago, September 8th, 1913.

Mr. W. H. Rowcroft,
c/o Sen. W. A. Clark,
77th & 5th Ave.,
New York, N. Y.

Dear Sir:

Sometime ago, Mr. Seymour J. Thurber of Chicago placed in your care, a series of twelve paintings by William Hogarth belonging to Mr. Eli P. Clark, Los Angeles, Cal. Mr. Thurber advises me that you are desirous of being relieved of further care of these paintings and would like to have them removed. **[87]** I am a nephew of Mr. Clark and his personal representative in this matter with Mr. Thurber and would consider it a favor if you would forward the paintings by express, charges collect, to his Los Angeles address which is as follows:

Mr. Eli P. CLARK,
Corner 6th & Hill Sts.,
Los Angeles, Cal.

Mr. Thurber tells me they are all boxed and ready

for shipment, so that they could be forwarded without delay. Would be pleased to have you advise me as soon as shipment is made.

Thanking you for your attention in this matter, I remain,

Very truly yours,
HENRY C. BENNETT."

And also a letter from W. H. Rowcroft to H. C. Bennet dated September 11, 1913, which letter is as follows:

[Exhibit—Letter, September 11, 1913, W. H. Rowcroft to H. C. Bennett.]

"Residence of W. A. Clark,
New York, September 11th, 1913.

Mr. H. C. Bennett,
c/o Mead & Coe,
69 Washington Street, Chicago.

Dear Sir:

I am forwarding via the American Express today three cases that were packed by your Mr. Thurber to Mr. Eli P. Clark, Corner 6th & Hill Sts., Los Angeles, Cal. I trust they will arrive there safe and thank you for giving me the information where to send them.

Very truly yours
W. H. ROWCROFT." [88]

[Deposition of Walter H. Rowcroft in Behalf of Defendant.]

Thereupon the deposition of WALTER H. ROWCROFT, in behalf of the defendants, was read in evidence as follows:

I am superintendent of Senator Clark's residence

(Deposition of Walter H. Rowcroft.)

in New York. I take care of the power plant and a certain percentage of the employees. I have known Seymour J. Thurber a little over a year; met him in February, 1913. He came in one morning and said he was bringing in three cases of pictures, and wanted to know if he could see the Senator. I sent him the message and the Senator said he would see him. The pictures were unpacked in the basement. He saw the Senator after they were unpacked. There were twelve Hogarth pictures. I brought the Senator into the gallery and introduced him to Mr. Thurber. The Senator looked them over and said he did not like them. Mr. Thurber started to explain the pictures and Mr. Clark said he did not wish to spend any time on them, as he had no room and did not care for them. Then they looked at some other pictures belonging to Mr. Clark, and Mr. Clark said he was in a hurry to get down to his office, and Mr. Thurber again brought up the subject of the pictures and told Mr. Clark that they belonged to Eli P. Clark of Los Angeles, and Mr. Clark said, "Oh, yes, I know it." He was about to bid Mr. Thurber good-bye when Mr. Thurber asked him if it would be too much to have the pictures left there for a little while as he had someone else in New York he wished to show them to, and Mr. Clark turned to me and addressed Mr. Thurber and said, "You arrange with Mr. Rowcroft, it will be agreeable to me."

At the time I received the letter from Mr. Bennett dated September 8th, 1913, the three boxes were

(Deposition of Walter H. Rowcroft.)

where Mr. Thurber left them in the basement. After getting that letter from Mr. Bennett **[89]** I answered the letter. I did not keep the Hogarths. It says that they were shipped to Mr. Eli P. Clark at Los Angeles, California. Between the time I received Mr. Bennett's letter and the time I shipped those boxes, I had a communication with Mr. St. Clair in Senator Clark's office. He told me that he had received a telegram from Mr. Eli P. Clark of Los Angeles, California, about some paintings and asked me what I knew about it, and I told him that I had also received a letter from Mr. Bennett who claimed to be a nephew of Eli P. Clark, asking to have the pictures shipped to his uncle, and Mr. St. Clair and I spoke of the shipping of it, and he asked me if I had ever heard of Eli P. Clark, and I said yes, that the Senator himself knew the gentleman as far as I knew, as they had been speaking about him in the gallery the day Mr. Thurber came there. He said, "Well, ship them as long as you are anxious to get them out of the way."

[Deposition of W. Y. C. Humes.]

The deposition of W. Y. C. Humes was then read in evidence as follows:

I am forty-six years of age. Was in the publishing and art business in 1911, 12 and 13, in Chicago, in the corporation known as Tomlinson-Humes, Incorporated. I was president and gave my attention to all the business, but more especially to the art works and high priced books. I know Thomas Myers and Eli P. Clark; have known him since 1910.

(Deposition of W. Y. C. Humes.)

We received a letter from Thomas Myers in December, 1911, in which he says, "Trusting that your Los Angeles man turns up trumps." Prior to the receipt of that letter I had had a talk with Mr. Myers about a Los Angeles man. I probably had several talks with him, but particularly I remember we had a patron in [90] Los Angeles, California, to whom I hoped to sell the collection of paintings on which we had an option from Mr. Myers. It was Mr. E. P. Clark, the defendant in this suit. We had other people in mind in Los Angeles besides Mr. Clark, and I could have mentioned others to Mr. Myers as well as Mr. Clark.

The document marked Defendants' Exhibit 4, which is now shown to me bears the signature of the corporation of Tomlinson-Humes, Incorporated, signed by me as its president. The option to which I have just referred is the same option which is referred to on the first page of this exhibit. That option was in writing. It was signed probably in December, 1911, or January or February, 1912. This is the option from Myers to Tomlinson-Humes. It was executed in duplicate, one copy was given to Mr. Thomas Myers and one retained by myself. I do not know where either of them is now. The one which was given to Mr. Myers when we collected the pictures from Mr. Myers was turned back to us to be destroyed. I don't recall the actual fact of this physical destruction, but I assumed it was. I do not know what became of the one that belonged to Tomlinson-Humes, Incorporated. There were

(Deposition of W. Y. C. Humes.)

papers and all sorts of things belonging to this transaction in the hands of the corporation when the receiver took charge.

The documents now shown to me, being Defendants' Exhibits 2, 3, 15, 16 and 17, were received by you (Mr. McArdle, who was interrogating the witness), and turned over to Mr. Bennett by you. The turning over to Mr. Bennett was done in a room at the La Fayette Hotel in Buffalo, New York. The bill of sale from Tomlinson-Humes to Clark was given by me to Mr. Bennett with the other papers. At the time that paper was turned over to Mr. **[91]** Bennett, twelve of the pictures were in Buffalo. I don't know whether the other two were there or not. They were in a room in the La Fayette Hotel. We had three rooms connected with each other. The writing below the bill of sale was written by Mr. McArdle and was placed there after the paper was originally handed to Bennett. I signed it for the corporation. After the signing of that paper the pictures passed from Mr. Bennett's hands, as agent for Mr. Clark, to our hands as agent for Mr. Clark.

I know Professor Chattain. I have known him since 1909 or 1910. I told him that we wanted to arrange so that we could present these pictures to Senator Clark. I told him when we wrote that I wanted him to be perfectly frank with Senator Clark and to let Senator Clark know that Eli P. Clark was the owner of the pictures.

I have known Seymour J. Thurber since 1909 or 10. After that he became regularly employed and

(Deposition of W. Y. C. Humes.)

connected with our organization. At the time the Hograth pictures were exhibited at Senator Clark's mansion Thurber and I were stopping at the same hotel in New York City. Thurber was instructed by me to take them up there and exhibit them. Then I told him he had best tell Senator Clark's secretary and also Senator Clark that the pictures which we wanted to exhibit to him belonged to Eli P. Clark of Los Angeles. Mr. Thurber reported to me that he had arranged to leave the pictures indefinitely at Senator Clark's gallery. I instructed him to get a receipt from Senator Clark or the superintendent of his galleries for the paintings.

The petition in bankruptcy against our corporation was filed about the middle of July. Upon the filing of that petition, the assets and property, all the property of the corporation, was turned over to the trustee. [92]

On cross-examination, the witness further testified:

The receipt written upon the second page of Defendants' Exhibit 3 was written about half an hour after the delivery of the instrument itself. During that time the parties were still in the same locality. The parties did not separate after the delivery of the first contract, but continued together until the receipt was made. Mr. Thurber was acting in New York under my direction, or should have been. Specific directions to him would be derived from me as an officer of Tomlinson-Humes, but Mr. Thurber was operating under a written contract

(Deposition of W. Y. C. Humes.)

with our company that directed his movements and controlled his responsibility. That contract concerned his duties and retainer. It was a very elaborate contract.

Witness further examined by counsel for defendants: I told Mr. McArdle I wanted the transfer to be properly made to Mr. Clark, but not as his attorney. I also told Mr. McArdle that I had written to Mr. Clark telling him we were bringing our attorney on to Buffalo for the purpose of seeing that the title was properly transferred from Mr. Myers. I made practically the same statement to Mr. Bennett. I told Mr. McArdle when introducing him to Mr. Bennett in Buffalo that I brought him (Mr. McArdle) on for the purpose of seeing that the transfer was properly made.

Thereupon the plaintiff rested.

[Testimony of Eli P. Clark, in Behalf of Defendants.]

ELI P. CLARK, being called and sworn in behalf of the defendants, testified as follows:

Referring to the four promissory notes that appear in the evidence were given by me to Tomlinson-Humes, Incorporated, in amount $31,250 each falling due January 28, 1913, July 28, 1913, January 28, 1914, and July 28, 1914, I paid the first one prior to the adjudication, I have since paid all of them. [93]

I had no information March 28, 1912, nor May 11th, nor at any time during May, that Tomlinson-Humes Company were bankrupt or insolvent. I be-

(Testimony of Eli P. Clark.)

lieved they were not. Nor did I at any of these times have any intention to delay, defeat or defraud the creditors of Tomlinson-Humes, or assist them in delaying, defeating or defrauding their creditors, nor did I have any information or belief of any intent on their part to defeat or defraud their creditors.

Thereupon the defendants rested.

[Stipulation for Settlement of Statement on Appeal.]

It is stipulated that the foregoing be settled, certified and allowed as the statement on appeal herein. Sept. 27, 1915.

MULFORD & DRYER,
WILBUR BASSETT,
Solicitors for Complainant.
HERBERT J. GOUDGE,
HARTLEY SHAW,
Solicitors for Defendants.

[Order Settling Statement on Appeal.]

Whereupon the foregoing is settled, certified and allowed as the statement on appeal herein.

Dated October 4th, 1915.

OSCAR A. TRIPPET,
Judge.

[Endorsed]: No. A-101—Equity. In the District Court of the United States, for the Southern District of California, Southern Division. Frank M. McKey, Trustee, etc., vs. Eli P. Clark, et al. Statement on Appeal. Filed Oct. 4, 1915. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. Mul-

ford & Dryer & Wilbur Bassett, Suite 615 I. N. Van Nuys Building, Los Angeles, Cal., Attorneys for Plaintiff. [94]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

A–101.

FRANK M. McKEY, Trustee in Bankruptcy, of TOMLINSON–HUMES, INCORPORATED, Bankrupt,

Complainant,

vs.

ELI P. CLARK, LOS ANGELES WAREHOUSE COMPANY, a Corporation,

Respondents.

Petition on Appeal.

To the Honorable OSCAR A. TRIPPET, District Judge:

The above-named complainant, Frank M. McKey, trustee in bankruptcy of the estate of Tomlinson-Humes, Incorporated, bankrupt, conceiving himself aggrieved by the order and decree made and entered by the above-named Court in the above-entitled cause, under 5 day of August, 1915.

Wherein and whereby, among other things, it was and is ordered that the bill of complaint herein be dismissed, and that the defendants recover their costs herein, defendants hereby appeal to the United States Circuit Court of Appeals for the Ninth Cir-

cuit from said order and decree and of all the said order and decree for the reasons set forth in the assignment of errors which is filed herewith, and,

Prays that this, his petition for the said appeal, may be allowed, and that the transcript of the records, proceedings [95] and papers upon which said order was made and of the statement on appeal herein duly authenticated may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

WILBUR BASSETT,
MULFORD & DRYER,
Solicitors for Complainant.

Dated September 7, 1915, in said term.

[Endorsed]: Original. No. A–101. In the District Court of the United States, for the Southern District of California, Southern Division. Frank M. McKey, Trustee in Bankruptcy, etc., Complainant, vs. Eli P. Clark et al., Respondent. Petition for Appeal. Received copy of within this 7th day of Sept., 1915. Goudge, Williams, Chandler & Hughes, Attorneys for Respondents. Filed Sep. 7, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Mulford & Dryer & Wilbur Bassett, Suite 615 I. N. Van Nuys Building, Los Angeles, Cal., Attorneys for Complainant. [96]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

A–101.

FRANK M. McKEY, Trustee in Bankruptcy, of TOMLINSON–HUMES, INCORPORATED, Bankrupt,

Complainant,

vs.

ELI P. CLARK, LOS ANGELES WAREHOUSE COMPANY, a Corporation,

Respondents.

Assignment of Errors.

Comes now the complainant, Frank M. McKey, trustee, and files the following assignment of errors on which he will rely upon his appeal from the decree made by this Honorable Court on the 5th day of August, 1915, in the above-entitled cause.

I.

That the said United States District Court for the Southern District of California, Southern Division, erred in dismissing the said suit and entering a final decree therein in favor of the said respondents for their costs against said complainant.

II.

[97]

That the said Court erred in not making, rendering and entering a decree in favor of the said complainant and against the said defendants for the pos-

session of the paintings described in the bill of complaint herein.

[Endorsed]: Original. No. A–101. In the District Court of the United States, for the Southern District of California, Southern Division. Frank M. McKey, Trustee in Bankruptcy, etc., Complainant, vs. Eli P. Clark, et al., Respondents. Assignment of Errors. Received copy of within this 7th day of Sept., 1915. Goudge, Williams, Chandler & Hughes, Attorneys for Respondents. Filed Sep. 7, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Mulford & Dryer & Wilbur Bassett, Suite 615 I. N. Van Nuys Building, Los Angeles, Cal., Attorneys for Complainant. [98]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

FRANK M. McKEY, Trustee in Bankruptcy, of TOMLINSON–HUMES, INCORPORATED, Bankrupt,

Complainant,

vs.

ELI P. CLARK, LOS ANGELES WAREHOUSE COMPANY, a Corporation,

Respondents.

Order Allowing Appeal.

Upon motion of Wilbur Bassett, Esq., solicitor for complainant, and upon reading the petition of complainant for an order allowing appeal, together with

an assignment of errors, it is ordered that an appeal be and is hereby allowed to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree heretofore made, entered and filed herein on the 5th day of August, 1915; and that a transcript of the record herein be forthwith transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit. It is further ordered that the bond on appeal be fixed at the sum of Two Hundred Fifty and no/100 Dollars ($250), and that the injunction heretofore entered herein restraining the respondents be and the same is hereby restored and continued in force during the pendency of said appeal or until further order herein. [99]

Los Angeles, California.

In open court, October 4, 1915.

OSCAR A. TRIPPET,
District Judge.

[Endorsed]: Original. No. A–101—Equity. In the District Court of the United States, in and for the Southern District of California, Southern Division. Frank M. McKey, Trustee in Bankruptcy of Tomlinson-Humes, Incorporated, Bankrupt, Complainant, vs. Eli P. Clark, Los Angeles Warehouse Company, a Corporation, Respondents. Order Allowing Appeal. Filed Oct. 4, 1915. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. Wilbur Bassett, Attorney at Law, 333 Van Nuys Building, Los Angeles, Cal. [100]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

FRANK M. McKEY, Trustee in Bankruptcy, of TOMLINSON-HUMES, INCORPORATED, Bankrupt,

Complainant,

vs.

ELI P. CLARK, LOS ANGELES WAREHOUSE COMPANY, a Corporation,

Bond on Appeal.

Respondents.

KNOW ALL MEN BY THESE PRESENTS: That we, the Fidelity & Deposit Company of Maryland, a corporation, are held and firmly bound unto Eli P. Clark and Los Angeles Warehouse Company, defendants herein, in the full and just sum of Two Hundred fifty and no/100 Dollars ($250), to be paid to said defendants, their attorneys, executors, administrators or assigns, to which payment well and truly to be made we bind ourselves firmly by these presents.

WHEREAS lately at a session of the District Court of the United States, in and for the Southern District of California, Southern Division, in a suit pending in said court between the [101] said Frank M. McKey, trustee of the estate of Tomlinson-Humes, Incorporated, bankrupt, complainants and Eli P. Clark and Los Angeles Warehouse Company,

respondents, a decree was rendered dismissing the bill of the said complaint against said defendants and the said Frank M. McKey, trustee, having obtained from said Court any order allowing an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the decree hereinbefore mentioned, and, whereas a citation directed to the said respondents is about to be issued, citing and admonishing them to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, California,

NOW the condition of the above obligation is such that if the said Frank M. McKey, trustee, shall prosecute his appeal to effect and shall answer all damages and costs that may be awarded against him, if he fail to make his appeal good, then the above obligation is to be void, otherwise to remain in full force and effect.

IN WITNESS WHEREOF the corporate seal and name of said surety is hereby affixed and attested by its duly authorized officers at Los Angeles, California, this 11th day of October, 1915.

FIDELITY & DEPOSIT COMPANY OF MARYLAND.

By HARRY D. VANDEVEER,
Attorney in Fact.

(Seal) Attest: J. HOMER NISHWITZ,
Agent. [102]

State of California,
County of Los Angeles,—ss.

On this 11th day of October, 1915, before me, C.

M. Evarts, a notary public in and for the said county of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared Harry D. Vandeveer, known to me to be the attorney in fact, and J. Homer Nishwitz, known to me to be the agent of the Fidelity and Deposit Company of Maryland, the corporation that executed the within instrument, and acknowledged to me that they subscribed the name of the Fidelity and Deposit Company of Maryland thereto and their own names as attorney in fact and agent, respectively.

[Seal] C. M. EVARTS,

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Original. No. A–101—Eq. In the District Court of the United States, for the Southern District of California, Southern Division. Frank M. McKey, Trustee in Bankruptcy of Tomlinson-Humes, Inc., Bankrupt, Complainant, vs. Eli P. Clark, and Los Angeles Warehouse Company, a Corporation, Respondents. Bond on Appeal. Bond Approved this 13 day of October, 1915. Oscar A. Trippet, Judge. Filed Oct. 13, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Mulford & Dryer & Wilbur Bassett, Suite 615 I. N. Van Nuys Building, Los Angeles, Cal., Attorneys for Complainant. [103]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

A–101.

FRANK M. McKEY, Trustee in Bankruptcy of TOMLINSON–HUMES, INCORPORATED, Bankrupt,

Complainant,

vs.

ELI P. CLARK, LOS ANGELES WAREHOUSE COMPANY, a Corporation,

Respondents.

Praecipe to Clerk [for Transcript of Record on Appeal].

The clerk of said court will incorporate into the transcript upon the appeal appearing herein the following portions of the record upon said cause:

I.

The citations *be* issued herein requiring the respondents to appear in the Circuit Court of Appeals in the United States for the Ninth Circuit upon this appeal.

II.

The preliminary injunction granted herein, together with all orders extending or otherwise effecting same.

III.

The amended bill of complaint herein.

IV.

The answer of respondents to said bill.

V.

The petition and motion of respondents for leave to file a cross-bill herein.

VI. [104]

All minutes of the Court, and orders and decrees made in this cause.

VII.

All certificates made by the clerk of this court with reference to the proceedings, rulings and decrees of the Court herein.

VIII.

The petition for appeal herein; the order of the Court granting such appeal, and the appeal allowed; the assignments of errors of the complainant herein, and all orders of the Court in relation thereto.

IX.

The certificate of the clerk to the correctness of the record on appeal herein.

X.

The opinion and decision of Trippet, Judge herein.

XI.

The statement upon appeal herein, together with all orders concerning the same.

XII.

The decree herein.

Dated this 7th day of September, 1915.

WILBUR BASSETT,
MULFORD and DRYER,
Solicitors for Complainant.

[Endorsed]: Original. No. A–101. In the District Court of the United States for the Southern District of California, Southern Division. Frank

M. McKey, Trustee in Bankruptcy, etc., Complainant, vs. Eli P. Clark et al., Respondents. Praecipe to Clerk. Filed Sep. 7, 1915. Wm. M. Van Dyke, Clerk. By R. S Zimmerman, Deputy Clerk. Mulford & Dryer and Wilbur Bassett, Suite 615, I. N. Van Nuys Building, Los Angeles, Cal., Attorneys for Complainant. [105]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

FRANK M. McKEY, Trustee in Bankruptcy of TOMLINSON-HUMES, INCORPORATED, Bankrupt,

Complainant,

vs.

ELI P. CLARK, LOS ANGELES WAREHOUSE COMPANY, a Corporation,

Respondents.

Amended Praecipe to Clerk [As to Transcript on Appeal].

The clerk of said court in making up the transcript on appeal herein will omit all mere orders of continuance except the order after judgment continuing in force the injunction herein, and for that purpose paragraph VI of the praecipe heretofore filed is now amended by adding the words: "Except mere orders of continuance."

WILBUR BASSETT,
MULFORD & DRYER,
Solicitors for Complainant.

[Endorsed]: A–101—Equity. In the District Court of the United States, in and for the Southern District of California, Southern Division. Frank M. McKey, et al., Complainant, vs. Eli P. Clark et al., Respondents. Amended Praecipe to Clerk. Wilbur Bassett, Attorney at Law, 446 Title Insurance Building. F2486—Main 5804. Los Angeles, Cal. Filed Dec. 20, 1915. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. **[106]**

[Certificate of Clerk U. S. District Court to Transcript of Record.]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. A–101—EQUITY.

FRANK M. McKEY, Trustee in Bankruptcy of TOMLINSON–HUMES, INCORPORATED, Bankrupt,

Complainant,

vs.

ELI P. CLARK and LOS ANGELES WAREHOUSE COMPANY, a Corporation,

Defendants.

I, Wm. M. Van Dyke, Clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing one hundred and six (106) typewritten pages, numbered from 1 to 106, inclusive, and comprised in one (1) volume, to be a full, true and correct copy of the Minute Orders of December 17th,

1913, and January 6th, 1914, the Amended Bill of Complaint, Answer, Notice of Application for Leave to Amend Answer and File Counterclaim, Minute Orders of March 6th, 1914, and May 4th, 1914, Amended Answer, Preliminary Injunction, Minute Orders of July 17th, 1914, November 6th, 1914, July 21st, 1915, July 22d, 1915, August 2d, 1915, and August 5th, 1915, Decree, Minute Orders [107] of September 7th, 1915, September 10th, 1915, September 20th, 1915, September 27th, 1915, and October 4th, 1915, Statement on Appeal, Petition for Appeal, Assignment of Errors, Order Allowing Appeal, Bond on Appeal, Praecipe for Preparation of Transcript, and Amended Praecipe, in the above and therein-entitled action, and that the same together constitute the record upon appeal of Frank M. McKey, Trustee in Bankruptcy, of Tomlinson-Humes, Incorporated, Bankrupt, herein, as specified in the Praecipe and Amended Praecipe for Preparation of Transcript filed in my office on behalf of appellant by his solicitors of record.

I DO HEREBY CERTIFY, that the cost of the foregoing Transcript Upon Appeal is $52 90/100, the amount whereof has been paid me by Frank M. McKey, Trustee in Bankruptcy, of Tomlinson-Humes, Incorporated, Bankrupt, the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court of the United States of America, in and for the Southern District of California, Southern Division, this 24th day of December, in the year of our Lord one thousand nine hundred and fifteen, and of

our Independence the one hundred and fortieth.

[Seal] WM. M. VAN DYKE,

Clerk of the District Court of the United States of America, in and for the Southern District of California.

By Leslie S. Colyer,
Deputy Clerk.

[Ten-cent Internal Revenue Stamp. Canceled 12/24/15. L. S. C.] [108]

[Endorsed]: No. 2721. United States Circuit Court of Appeals for the Ninth Circuit. Frank M. McKey, Trustee in Bankruptcy of Tomlinson-Humes, Incorporated, Bankrupt, Appellant, vs. Eli P. Clark and Los Angeles Warehouse Company, a Corporation, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

Filed December 29, 1915.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

[Order Enlarging Time to December 31, 1915, to Docket Cause and File Record Thereof.]

In the United States Circuit Court of Appeals, Ninth Judicial Circuit.

FRANK M. McKEY, Trustee in Bankruptcy of TOMLINSON–HUMES, INCORPORATED, Bankrupt,

Appellant,

vs.

ELI P. CLARK, LOS ANGELES WAREHOUSE COMPANY, a Corporation,

Appellees.

Good cause appearing therefor, it is hereby ordered, that the time heretofore allowed said appellant to docket said cause and file the record thereof with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, be, and the same is hereby enlarged and extended to and including the 31st day of December, 1915.

Dated at Los Angeles, October 30th, 1915.

OSCAR A. TRIPPET,
U. S. District Judge,
Southern District of California.

[Endorsed]: No. 2721. United States Circuit Court of Appeals for the Ninth Circuit. Frank McKey, Trustee, etc., Appellant, vs. Eli P. Clark, et al., Appellees. Order extending time to file record. Filed Nov. 1, 1915. F. D. Monckton, Clerk. Refiled Dec. 29, 1915. F. D. Monckton, Clerk.

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No. 2721.

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

Frank M. McKey, trustee in bankruptcy of the Estate of Tomlinson-Humes, Incorporated, Bankrupt,

Appellant,

vs.

Eli P. Clark and Los Angeles Warehouse Company, a corporation,

Appellees.

APPELLANT'S OPENING BRIEF.

MULFORD & DRYER,
WILBUR BASSETT,
Solicitors for Appellant.

Parker & Stone Co., Law Printers, 238 New High St., Los Angeles, Cal.

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

Frank M. McKey, trustee in bankruptcy of the Estate of Tomlinson-Humes, Incorporated, Bankrupt,

Appellant,

vs.

Eli P. Clark and Los Angeles Warehouse Company, a corporation,

Appellees.

APPELLANT'S OPENING BRIEF.

This is an action in equity, brought by a trustee in bankruptcy to recover possession of certain valuable and historic paintings by Hogarth, the first great English painter, upon the theory that they are part of the assets of a bankrupt estate.

An action in replevin on the law side of the court was not brought, because the alternative remedy in damages allowed in such cases would not have been an adequate remedy on account of the peculiar and uncertain value of the property. This point was argued

at length on a motion to dismiss and Judge Wellborn retained the bill.

Thomas Myers of Buffalo owned these pictures in 1911 and at some time during that year made an agreement with Tomlinson-Humes, the present bankrupt, who were dealers in paintings, authorizing them to purchase these pictures at a fixed price, and empowering them to sell the pictures and convey a good title. The following year the pictures were shipped to the bankrupt from New York and placed in the sales-rooms of the bankrupt. The bankrupt then sent Mr. Humes to Los Angeles, the pictures still remaining in the sales-rooms in Chicago, and sold the pictures to the defendant E. P. Clark under a contract which authorized the bankrupt to retain and resell the pictures in their possession and execute any necessary conveyances.

Clark, up to this time, had not seen the paintings, and the bankrupt soon after shipped them to Buffalo, where they were identified by Myers in the presence of agents of the bankrupt and Clark, and a bill of sale was then made from Myers to the bankrupt and one from the bankrupt to the defendant Clark. Within thirty minutes thereafter, the bankrupt endorsed upon the base of defendant's bill of sale an acknowledgment of receipt of the pictures and the pictures were then brought back to the ware-rooms of the bankrupt in Chicago. A short time thereafter, the pictures were sent to New York City and offered for sale by the bankrupt to Senator W. A. Clark, who did not care to purchase them, but allowed them to be left in a store-room in his house.

In July, 1913, a petition in bankruptcy was filed and the present appellant became trustee. Before the trustee could secure possession of the pictures, they were delivered by an employee of Senator Clark to the defendant E. P. Clark and are now subject to his order (and an injunction herein), in the possession of defendant Los Angeles Warehouse Company.

Upon trial, Judge Trippet rendered the decision, which we append to this brief, and dismissed the bill.

For the court's convenience, we suggest the following summary of dates:

June/1911. Option to buy pictures executed by Thos. Myers to Tomlinson-Humes, with power to sell and convey.

March/15/12. Pictures shipped from Ehrich galleries, New York City, to galleries of bankrupt in Chicago.

March/28/12. Tomlinson-Humes execute bill of sale to Clark, the respondent herein, in Los Angeles, and receive his notes for $125,000.

April/10/12. Bankrupt in letter to Clark suggests that Clark go to Buffalo to inspect the pictures, which he had not yet seen.

May/3/12. Bankrupt notifies respondent Clark that his notes have been hypothecated.

May/12. Bankrupt takes the pictures to Buffalo for identification by Myers.

May/11/12. Myers identifies pictures before Clark's agent and executes second bill of sale of pictures to respondent Clark and continues in possession of pictures, endorsing receipt upon the bill of sale.

May/12/12. Bankrupt returns pictures to its storerooms in Chicago.

Sept./12. Pictures taken by bankrupt to Akron, Ohio, for sale.

Feb. or Mch./13. Pictures taken to New York City by bankrupt for sale, and with permission of Senator Clark left in his residence by bankrupt.

July/17/13. Petition in bankruptcy filed against Tomlinson-Humes.

July/30/13. Adjudication; appellant appointed trustee.

Sept./11/13. Pictures shipped by custodian of the Clark residence in New York City to respondent Eli P. Clark in Los Angeles.

Nov./26/13. Trustee filed bill in District Court in Los Angeles to recover possession and restraining order and injunction issued restraining respondent Los Angeles Warehouse Co. from delivering pictures to respondent Clark.

We believe that the above will furnish a useful skeleton upon which to drape the detailed facts of the case.

POINTS.

1. The option from Myers to bankrupt contained a power of sale.

2. The contract between bankrupt and respondent Clark, executed in Los Angeles, is not an option to purchase, but a bill of sale, purporting to transfer title *per verba de praesenti.*

3. The sale by bankrupt to respondent Clark was conclusively fraudulent and void as to creditors in California, where the contract was made, and in Illinois, where the pictures were then situated.

4. The pictures were never delivered by the bankrupt to Clark, nor by Myers to Clark.

5. When the petition in bankruptcy was filed, the pictures were in the possession of the bankrupt and in *custodia legis,* and respondent and all the world were bound by a constructive *caveat,* injunction and attachment.

6. The trustee is entitled to judgment for possession and the bankruptcy court in Illinois is the proper forum to determine the extent of the trustee's interest.

ARGUMENT.

1. THE OPTION FROM MYERS TO BANKRUPT CONTAINED A POWER OF SALE.

The evidence shows that the written contract between Myers and the bankrupt was not in the possession of the trustee and could not be produced upon the trial, but witnesses testified without objection that it contained a power of sale with authority to the bankrupt to deliver to purchaser and make necessary conveyances. "I don't know where the Myers option is. The pictures were shipped to Chicago after the option was concluded. Tomlinson-Humes were authorized to sell them under the terms of the option." [Thurber, Tr. p. 72.] "That option from Mr. Myers authorized the bankrupt to make a conveyance of these pictures if sold." [Thurber, Tr. p. 75.] "After an option was obtained, the pictures were taken to Chicago and put in the hands of our restorer under my directions. We then went to the coast, to Los Angeles, and sold them to Mr. E. P. Clark." [Thurber, Tr. p. 72.] The court

will observe that the above testimony is undisputed and was introduced without objection, and that it is not testimony of a party, but of a disinterested third person. It is undenied.

As bankrupts had the power to sell and convey at the time they made their contract with the respondent Clark, both Myers and bankrupt were bound by this sale, as between themselves and Clark, and a consideration having passed from Clark to bankrupt at that time, it is to be regarded as a concluded sale, good as between bankrupt and Clark, but voidable as to creditors, for failure to comply with the statute of frauds.

2. THE CONTRACT BETWEEN BANKRUPT AND RESPONDENT CLARK, EXECUTED IN LOS ANGELES, IS NOT AN OPTION TO PURCHASE, BUT A BILL OF SALE PURPORTING TO TRANSFER TITLE PER VERBA DE PRAESENTI.

This is a consideration of vital importance to this case and its determination must rest upon the words of the contract of the bankrupt with Clark, executed in Los Angeles March 28, 1912. This contract [Tr. p. 53] recites that bankrupt had an option from Myers; describes the paintings sought in this action, and "second party hereby purchases from first party above named fourteen paintings and each and every one of them for a total price of $125,000 and contemporaneously herewith makes payment for such paintings with four promissory notes." [Tr. p. 56.] It is significant that Clark, who doubtless had the original Myers option before him, "hereby purchases from first party," that is, the bankrupt. This act shows without

question that the bankrupt had by virtue of his option an express authority to sell and convey. Clark was evidently convinced of this fact, for he "hereby purchases from first party" and at the same time gave his negotiable notes for $125,000. The contract was in every respect a sufficient bill of sale and was intended to pass title upon its execution. That this was the view of the parties at the time is shown by the immediate appointment of bankrupt as agent and broker, "from March 28, 1912," to sell the pictures for Clark, "and to assign, transfer and deliver the same on making sale or sales and to receive and receipt for the purchase price thereof." [Tr. p. 61.] Clause fourteen (14) provided for insurance in the name of Clark in an aggregate of $250,000. Not only does the contract purport to convey title to Clark as a complete bill of sale, but it also aims to protect that title and to appoint bankrupts as selling agents with the full power of sale, which could not be revoked or terminated except upon the conditions of payment, minutely set out. [Tr. p. 58.] They had therefore an authority coupled with an interest. The question of when title passes is always to be determined by the intention of the parties as shown by their acts, and we submit that every line of the contract with Clark carries the conviction that it was the intention of the parties that title should pass on March 28, 1912. Upon that day bankrupt had the paintings in their possession in Chicago with full authority under their contract with Myers to sell and make a good conveyance, and their contract with Clark expressly provides that they shall continue in possession with the same authority to sell for Clark

as they doubtless previously had to sell for Myers. No delivery of the paintings was contemplated or mentioned in the contract and the recognition of bankrupt by Clark as his agent was a sufficient delivery from bankrupt to Clark for the purposes of this sale. That this fictitious delivery was void and fraudulent as against creditors does not affect the question, for it was good as between the parties, and we submit that in any case where A is in possession of goods and sells to B, who pays the consideration and makes A his agent to sell, in the absence of a stipulation in regard to delivery, no further delivery is essential as between the parties. It is clear that bankrupt at once might have made a sale of these paintings to a third party and have executed a valid conveyance under the authority expressly granted under the contract. This is precisely what bankrupt did in selling to Clark in Los Angeles by virtue of the power of sale given by Myers. As to all property which a bankrupt could have conveyed a good title, the law vests the trustee with good title.

3. The sale by bankrupt to the respondent Clark was conclusively fraudulent and void as to creditors in California, where the contract was made, and in Illinois, where the property was then situated.

> "Every transfer of personal property * * * is conclusively presumed if made by a person having at the time the possession or control of the property and not accompanied by an immediate delivery, and followed by an actual and continued possession of the thing transferred, to be fraudu-

lent and therefore void against those who are his creditors, while he remains in possession * * * and against any persons on whom his estate devolves in trust for the benefit of others."

C. C. Cal., Sec. 3440.

"A sale not followed by an open or visible or notorious change of possession or ownership is void under the law of Illinois, which does not allow the owner of personal property to sell and still continue in possession."

Dooley v. Pease, 180 U. S. 126.

Since the amendment of 1910, section 47a and section 70 have been construed together so as to enable a trustee to defeat any pretended transfer which a creditor might have defeated.

In re Hammond, 26 A. B. R. 336, 188 Fed. 1022.

Thus, where the bankrupt made a bill of sale of a motor truck and failed to make delivery before bankruptcy and the vendee filed a petition to reclaim the property, which was still in the possession of the bankrupt, the court held the trustee vested with the rights of a lien creditor by virtue of the amendment to the Bankruptcy Act of 1910, Sec. 47a, 2, and was entitled to reclaim the property as against the bankrupt's vendee. *In re* Waite Robbins Motor Company, 27 A. B. R. 541, 192 Fed. 47.

The court will note that the trial court in his opinion herein relied upon York Mfg. Co. v. Cassell, 201 U. S. 344, which was decided before the amendment of 1910.

As to this case, the Circuit Court of Appeals of the sixth circuit said in a recent decision:

> "There is a general agreement that the amendment of 1910 was made with the very purpose of changing the rule declared in York v. Cassell, and we think it clear that such was the effect and that the trustee stands in the place of each creditor and may assert the right which any creditor would have had against the property 'in custody' if that creditor at date of filing the petition in bankruptcy had been holding an execution levy. See Massachusetts Co. v. Kemper, 34 A. B. R. 80, 220 Fed. 847. It cannot be said that the intent of the amendment was only to put the trustee in the position of a creditor, who had in fact obtained a lien, because that was the law before the amendment." Potter Mfg. Co. v. Arthur, 34 A. B. R. 75 (March, 1915), 220 Fed. 843.

4. The pictures were never delivered by the bankrupt to Clark, nor by Myers to Clark.

We have shown that the bill of sale executed in Los Angeles purported to pass title from Tomlinson-Humes to Clark, while the pictures remained in Chicago, and that it provided the vendor should continue in possession as the agent of Clark for the purpose of sale, an arrangement which was perfectly valid between the parties to pass title to Clark, but which was absolutely void as against the creditors of the vendor. Upon the execution of the bill of sale to Clark, in Los Angeles, Clark delivered to bankrupt his negotiable notes for $125,000 in payment for the paintings and Humes, upon his return to Chicago, notified Clark by letter [Tr. p. 66]: "We have obtained sufficient money on

your paper to pay Mr. Myers." Upon the day that Humes arrived in Chicago on his return from Los Angeles, he wrote Clark [Tr. p. 65]: "We are making great plans for a successful campaign for selling these pictures for you. As soon as we can get these detailed matters adjusted, I will take Mr. Thurber with me to Huntsville to meet Mrs. Scott." Mrs. Scott was a prospective purchaser in Huntsville, Alabama. This letter was written April 10 and in the early part of the following month Tomlinson and Humes, with their attorney, McArdle, went to Buffalo with the pictures for the purpose of having them shown to an agent of the respondent Clark and identified by Mr. Myers. Tomlinson and Humes and Myers met at the office of Mr. Spaulding. "We made the exchanges with Mr. Myers and his daughter of the consideration that was to be paid there for those pictures in Mr. Spaulding's office." [Humes, Tr. p. 70.] The entire party then proceeded to the Lafayette Hotel, where Humes, Tomlinson and McArdle had a suite of three adjoining rooms. The pictures had been brought to Buffalo and were upon chairs in Mr. Tomlinson's room. A second bill of sale from bankrupt to Clark was then delivered to Bennett.

"When we came to the Lafayette Hotel, we went first into one of the rooms at the end of the suite. The pictures were in the center room. We went in there first and Mr. Bennett was waiting in the other room and we had some formalities in there that Mr. Bennett was not in on, and I am inclined to think that the papers were transferred there. * * * Then when we were fixed up between us, we passed into the other room and Mr. Bennett was introduced to Mr. Myers

and Miss Myers and Mr. Spaulding. I believe these papers were all passed to Mr. Bennett. Mr. Myers went over each one of these pictures and identified them to Mr. Bennett. The pictures were transferred right there to Mr. Bennett." [Tomlinson, Tr. p. 71.]

We moved to strike out the last statement of the witness as a conclusion, which motion was denied by the court. We submit that it is clearly a question of law whether on the facts shown, the identification of the pictures in the manner described, operated as a transfer.

The witness then went on to state that he surrendered his room in which the pictures were located and that Mr. Bennett "set about arranging for storage of the paintings that night." Whatever this conclusion of the witness may be worth, it does appear that McArdle and Humes left the room and upon returning a few minutes later McArdle wrote upon the base of bankrupt's second bill of sale to Clark a receipt for all of the paintings, "possession being delivered in the Lafayette Hotel, Buffalo, N. Y., after the paintings had been identified by Mr. Thomas Myers, mentioned in said contract of March 28, 1912." [Tr. p. 52.] The pictures were still in the room of Mr. Tomlinson and the receipt was given within thirty minutes of the time when the pictures were shown to Bennett and the second bill of sale given to Clark.

We have shown that there was no delivery to Clark at the time the first bill of sale was made in Los Angeles and the evidence clearly shows that from that time to the time of the filing of the petition in bankruptcy, the paintings continued to be in the possession

of the bankrupt, who were actively offering them for sale.

Question: "Now, referring to the time when you say these pictures were received from Ehrich, N. Y., in March, 1912, did these pictures remain continuously in the possession of the bankrupt up to the time they were moved from the residence of Senator Clark."

Answer: "Yes, sir." [Thurber, Tr. p. 73.]

"The receipt upon the second page of defendants' Exhibit 3 was written about half an hour after the delivery of the instrument itself. During that time the parties were still in the same locality. The parties did not separate after the delivery of the first contract, but continued together until the receipt was made." [Humes, Tr. p. 94.]

Is it not then apparent that any delivery from bankrupt or Myers to Clark was merely colorable and symbolic, and that during the thirty minutes in which Bennett might have claimed possession on behalf of Clark, such possession was fictitious, was not exclusive, open or notorious and fails absolutely to stand any of the tests of delivery or possession as against creditors represented by the present trustee in bankruptcy?

Where there is no evidence of delivery of the property sold, or that, in point of time, the possession was yielded for an instant by the vendor, there is an entire failure of proof of such a sale as would enable the vendee to hold the property as against attaching creditors of the vendor.

Huschle v. Morris, 131 Ill. 587, 23 N. E. 623.

5. WHEN THE PETITION IN BANKRUPTCY WAS FILED THE PICTURES WERE IN POSSESSION OF THE BANKRUPT, AND IN CUSTODIA LEGIS, AND RESPONDENT AND ALL THE WORLD WERE BOUND BY A CAVEAT, INJUNCTION AND ATTACHMENT.

After the execution of the second bill of sale to Clark bankrupts took the pictures back to Chicago. [English, Tr. p. 76; Thurber, Tr. p. 72.] The expert restorer for bankrupts testifies:

"They were returned from Buffalo, and in a few days I started the restoration and framing of them. It took a long time. Then I packed them again and shipped them to Akron, Ohio. They were down there two or three months. I went down there and packed them and expressed them back to Chicago. They then remained in our possession quite a while. The next shipment was to New York. I expressed them there to S. J. Thurber." [Tr. p. 77.]

Thurber was an employee of bankrupt, who was present at the sale in Los Angeles in March, 1912. A year later we find him still engaged in selling them. He says:

"The next shipment was to New York, about the first of March, 1913. I think that they were delivered to Senator Clark's residence, 77th and Fifth avenue, and then unpacked by me personally and taken upstairs by me and placed in one of Senator Clark's art galleries." [Tr. p. 73.]

Senator Clark did not care to buy the pictures and Thurber continues:

"I asked Mr. Rowcroft, who was superintendent of Mr. Clark's residence, if I could leave them there for

further shipping directions, and he said that would be all right as far as he was concerned. * * * I wrote Mr. Rowcroft to deliver these pictures on my written order only." [Thurber, Tr. p. 73.]

It appears then that some time in April, 1913, these pictures were placed in the basement of Senator Clark's residence, subject to the order of bankrupt, and that they remained there until the 11th day of the following September. In the meantime, an adjudication in bankruptcy was entered against Tomlinson-Humes. The entire theory and claim of respondents in this case is based upon the possession which they acquired from the caretaker of the Clark mansion after adjudication, and we submit that there is no possible state of facts under which this possession acquired after adjudication and without the consent of the judge or referee of the District Court in Illinois could deprive the bankruptcy court in Illinois of the exclusive jurisdiction to determine the question of title and right of possession of these paintings. The amendment of 1910 to section 47a of the Bankruptcy Act thus extends the title of the trustee:

> "As to all the property in the custody or coming into the custody of the bankruptcy court shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon, and also as to all property not in the custody of the bankruptcy court shall be deemed vested with all the rights, remedies and powers of a judgment creditor, holding an execution duly returned and unsatisfied."

We have sought to establish our contention that the pretended sale to respondent Clark was void as against creditors for lack of delivery and the bankrupt therefore had title at the time of adjudication. But even if there were any doubt upon this question, it is apparent from a reading of the contract between bankrupt and Clark, set out in the first bill of sale, executed in Los Angeles, that the contract gave bankrupt full authority to sell and convey and this same authority was contained in the original agreement with Myers, executed in 1911, so that at all times since 1911 bankrupt had the power to sell and make conveyance. The Bankruptcy Act, Sec. 70, vests title in the trustee to all "property which, prior to the filing of the petition he (bankrupt) could by any means have transferred." The trustee was therefore vested with title to the paintings and this court has held that the vesting of title in a trustee vests also constructive possession. *(In re* Jersey Island Packing Co., 138 Fed. 625.) We think, however, that the pictures were in the actual possession of the bankrupt in the basement of Senator Clark's residence, subject to bankrupt's order, and that the possession of the bankrupt was possession of the trustee. We have then the trustee in possession, claiming title after adjudication. It is a familiar doctrine often stated by Your Honors that the filing of a petition in bankruptcy operates as a *caveat* to all the world and is in effect an attachment and injunction. Bank v. Sherman, 101 U. S. 407; Muller v. Nugent, 184 U. S. 1. There can therefore be no innocent purchaser or possessor after adjudication.

It is apparent then that any persons having claims to property in the possession of the bankrupt at the time of filing the petition must assert those claims in the bankruptcy proceeding and cannot in any way seize or acquire the property and require the trustee to follow up and adjudicate the matter in other courts.

6. THE TRUSTEE IS ENTITLED TO JUDGMENT FOR POSSESSION AND THE BANKRUPTCY COURT IN ILLINOIS IS THE PROPER FORUM TO DETERMINE THE EXTENT OF THE TRUSTEE'S INTEREST.

We have shown that the bankrupt was in possession at the time of adjudication and for a long time thereafter, and that title was vested in the trustee together with actual or at least constructive possession. It is not pretended that the District Court of Illinois or the referee authorized any delivery to respondent and it is elementary that no other authority could authorize it; even a voluntary delivery by the bankrupt or the trustee would confer no rights. As was said *In re* Rose Mfg. Co., reported 21 A. B. R. 725, 168 Fed. 39:

> "Although the bank took the property from the possession of the receiver without her knowledge or consent, yet if it be assumed that the receiver voluntarily turned it over, still the bankruptcy court was not deprived of jurisdiction."

It was there held that the property must be returned to the possession of the receiver and that the court would not determine questions of title or equities, but would leave the same to the bankruptcy court, to be determined after the order for possession had been complied with.

Even before the amendment of 1910, Your Honors held *In re* Jersey Island Packing Co., 14 A. B. R. 689, 135 Fed. 625:

> "In the present case there was no jurisdiction over the property of the bankrupt in any other court. The only jurisdiction was in the court of bankruptcy. The interest of the bankrupt in the mortgaged property will pass to the trustee when he is appointed, and in the meantime it is under the protection of the bankruptcy court. By sale of property under the direction of the bankruptcy court, interests of all parties may be protected."

Since the amendment to Sec. 47a, it is evident that the trustee is in the position of a lien creditor with an attachment in force, and the respondent in this case has therefore removed property upon which the trustee had a vested lien under the statute. The only forum which can determine the extent and validity of this lien is the bankruptcy court in Illinois. Certainly respondent will not be permitted to forceably remove the property and compel the trustee to determine the question in another court as against one who has removed the property without right. If respondent has any rights, they can be fully protected in a bankruptcy court.

We pass now to the discussion of the decision of the trial court. This decision the court delivered from the bench, but for some reason which we do not understand, afterwards refused to sign it. We were therefore unable to make it a part of the clerk's record and have inserted it at the end of this brief.

The court first dwells at length on York Mfg. Co. v. Cassell, 201 U. S. 344, which has been so entirely discredited that we know of no other present support for it. The rule in that case placed the trustee in the shoes of the bankrupt and subject to all equities good as against him.

> "Under the rule of York v. Cassell, *supra,* this superior right did not pass to the trustee in bankruptcy, but he stood in the shoes of the bankrupt. This rule has been changed by the amendment of June 25, 1910, to Sec. 47a, 2. * * * There is a general agreement that the amendment of 1910 was made with the very purpose of changing the rule declared in York v. Cassell; Remington, volume 3, paragraphs 1137 and 1213½; Loveland, 4th edition, Vol. 1, 1767; and we think it clear that such was the effect and that the trustee stands in the place of each creditor and may assert the right which any creditor would have had against the property 'in custody' if that creditor at date of filing the petition in bankruptcy had been holding an execution levy. See Massachusetts Co. v. Kemper, C. C. A. 6th circuit, 34 A. B. R. 80, 220 Fed. 847. It cannot be said that the intent of the amendemnt was only to put the trustee in the position of the creditor who in fact had obtained a lien because that was the law before the amendment."
>
> Potter Mfg. Co. v. Arthur, C. C. A. 6th circuit, 1915, 34 A. B. R. 75, 220 Fed. 843.

The court then quotes at length Hiscock v. Varick Bank, 206 U. S. 40, which was also decided before the amendment at the October term, 1906, and then refers to Security Warehousing Co. v. Hand, reported in the

same volume, page 415, which was decided at the same term, and is therefore without bearing in construing the amendment passed four years later.

The trial court continues:

"The only claim that the bankrupt had to this property was a contract of agency. * * * Now, I am of the opinion that the bankruptcy intervening, insolvency intervening did away with the agency."

We have already shown that the contract between bankrupt and Clark was not a mere agency, but an agency coupled with an interest. During the first year of the contract Clark had no power to terminate the agency and after that year he could only withdraw the paintings from sale by payment of 10% of the minimum selling price of $480,000. [Tr. p. 58.] How is it possible to conclude that such an agency, coupled with a vested interest, was terminated by the bankruptcy? The act itself vests in the trustee title to property which the bankrupt "could by any means have transferred" (Sec. 70a, 5) and the bankrupt was "clothed with full power and authority to sell—and to assign, transfer and deliver." [Tr. p. 61.]

But even if, as the court says, this was the only claim which the bankrupt could assert to the property, this is a false premise upon which to base the rights of the trustee. Here again the trial court was misled by York Mfg. Co. v. Cassell, cited at length in his opinion. Under the present Bankruptcy Act, the trustee is not limited to the title or claims of the bankrupt, as was said in Potter Mfg. Co. v. Arthur *(supra)*. The trustee no longer stands in the shoes of the bankrupt. We have shown, moreover, that even as between bank-

rupt and Clark, the agency was not a mere employment, but was coupled with an express interest in the property and full power to sell and convey. The theory of the trial court that such an agency could be terminated by bankruptcy would leave the trustee in a worse position than the bankrupt, whereas the express purpose and result of the amendments to the Bankruptcy Act, to which we have called the court's attention, was to place the trustee in a better position than the bankrupt, to-wit, in the condition and position of a lien creditor in possession.

The trial court continues: "It annulled the contract of agency and when that occurred, the owner of the property had a right to take possession of it." This proceeds upon the false premise that Clark owned the pictures, but this very question of ownership the trial court had no jurisdiction to determine. The issue of title is not tendered in this case, which concerns only the right of possession. The only court which has jurisdiction to determine the question of title is the bankruptcy court in Illinois, on proper issues there tendered. The bill of complaint herein is a chancery action in replevin and there was no attempt by the respondent to set up the question of title by cross-bill or prayer for affirmative relief.

The trial court voices a doubt whether the bankrupt was in possession, but this doubt we cannot share, as the evidence is undisputed. The bankrupt's employee, Thurber, had possession of the paintings in New York at the time of adjudication.

The court then asserts that our claim is that we were entitled to possession in order to assert some

imaginary lien. We submit that here again the learned trial court was misled by York Mfg. Co. v. Cassell, and the argument therein, and has overlooked the amendment of 1910, under which the trustee is by law vested with the rights of a lien claimant and it is unnecessary for him to make any proof of an actual lien or an actual lien claimant. He is at least *prima facie* an attaching creditor as to all property in possession of bankrupt.

The opinion continues:

"Assuming I am wrong in regard to the agency being revoked by this bankruptcy, the time in which these agents had to sell expired more than a year ago and the trustee now, if he got possession of it, could not perform the contract, because the contract has expired. It is absolutely a moot question."

The contract provided [Tr. p. 58] that if bankrupt did not sell during the first year, Clark might withdraw the pictures during thirty days following by paying 10% of $480,000.

"9. It is understood that if second party does not avail himself of the above described rights to withdraw any paintings from sale within thirty days after the expiration of one year from this date, then the paintings at that time on hand shall remain in the hands of the first party exclusively for a period of one year from that date under the provisions of this agreement.

"11. At the expiration of this contract on July 28, 1914, second party shall have the right to withdraw from sale and from the hands or agency of first party * * * all paintings unsold."

It is admitted by the answer that the respondent acquired possession of these pictures in September, 1913, nearly a year before he had a right under the contract to withdraw them, but the trial court thinks that because the year expired before trial there is now no right left in the trustee. If this were true, the respondent would be a vast gainer by his own wrong, but it must be evident that the question for determination is what right the trustee had upon the day when he was deprived of possession or at the utmost upon the day when he filed his bill in this proceeding. It is unthinkable that a party may take advantage of his own wrongful taking of property and the lapse of time during which a suit to recover it is pending as the basis of defeating the party from whom it was wrongfully taken.

It was the opinion of the trial court that bankruptcy terminated any agency which bankrupt had to sell for Clark, but we know of no authority for such view nor was any cited. On the contrary, as Remington says, Sec. 653:

> "Bankruptcy affects property and debts. It passes title to the property and divides it among the debts. It is not concerned with contractual relations or obligations. * * * Where a contractual relation exists, which has not become merged in a right of action provable as a debt, claim or demand in bankruptcy, such contractual relation continues to exist unimpaired; if the contractual relation is such as may be assumed by another, the trustee may assume it."

As was well said *In re* Roth, 164 Fed. 64, in speaking of the contention that the relation of landlord and tenant was terminated by bankruptcy:

> "Bankruptcy does not terminate the lease. This must be so from the very nature of bankruptcy, which does not destroy, but conserves property, and the leasehold estate is property which may and frequently does become the property of the trustee and inure to the benefit of creditors. It is impossible to conceive of a trustee in bankruptcy selling a lease, if bankruptcy destroy the same lease. If the lease survives adjudication and is rejected by the trustee (not appropriated as belonging to the estate), it is necessarily an existing and continuing contract and such contract requires parties thereto—the landlord is one—the other must be the bankrupt lessee."

So even in the case of personal privileges, such as membership in exchanges and clubs and licenses for the conduct of business, it is held that bankruptcy does not affect the relation. Thus the Circuit Court of Appeals for the first circuit in Fisher v. Cushman, 103 Fed. 860, held that even a liquor license granted by a police board was not affected by bankruptcy and any beneficial interest passed to the trustee. We contend that even if this were a mere agency, not coupled with an interest, it would not be terminated by the bankruptcy. The sale of these pictures could be carried on by the trustee as well as the bankrupt could have done it, and the universal rule is that if the contract is capable of being carried out by another, it is not affected by the bankruptcy.

We might admit that agencies for the performance of services, requiring personal skill, would be affected by bankruptcy as they are by death, and even if that were true, which we very much doubt, it does not affect this case, because the only part of the contract requiring personal skill, to-wit, the retouching of the paintings, had been performed and there remained merely the procuring of a purchaser. Thus in Janin v. Browne, 57 Cal. 37, the court said:

> "What remained to be executed, the sale of the property, could be done as well by the administrator as by Browne, had he lived."

And the same court said in Husheon v. Kelly, 162 Cal. 656:

> "The rule does not apply where the services are of such a character that they may be as well performed by others."

Although we have discussed this question, we attach no importance to it for the reason that the question of the continuance of the agency or the life of the contract itself is not concerned in this case, because the trustees will sell by virtue of vested rights of creditors in the property, expressly given by the Bankruptcy Act, whereas the trial court apparently thought that the trustee's right of possession, and right to sell, must be rested upon the relation of principal and agent. We are not here concerned with the question of any relation between bankrupt and Clark, but purely with the right of possession as between the trustee and Clark. Under the authority of York Mfg. Co. v. Cassell, these relations would be equivalent, but since the amendment

of 1910, the trustee stands in an entirely different position from that occupied by the bankrupt. We may suggest further that even if there were the relation of agency as between bankrupt and Clark, there never was any valid agency as between Clark and creditors of the bankrupt, because as to the claims of creditors, the bankrupt was the owner of the property and not merely an agent with possession for purposes of sale.

In conclusion, we invite the court's attention to the opinion of the trial court, which follows this brief, and suggest that it plainly appears therefrom that the trial court relied upon the authority of York Mfg. Co. v. Cassell, which is no longer a leading case, and that it further appears from the transcript that the appellant herein is entitled to possession of the paintings and that the question of title or equities cannot be determined in this proceeding, but that any rights which respondent may have can be fully protected upon application in a proper manner to the bankruptcy court in Illinois, and we are therefore entitled to a decree for possession.

Respectfully submitted,
MULFORD & DRYER,
WILBUR BASSETT,
Solicitors for Appellant.

DECISION OF THE COURT.

In the District Court of the United States for the Southern District of California, Southern Division.

Hon. Oscar A. Trippet, presiding.

Frank M. McKey, as trustee, plaintiff, v. Eli P. Clark, defendant.

Decision of the court.

Monday, August 2, 1915, 10 o'clock a, m,

The Court: In this case of McKey, trustee, v Clark, one of the issues in the case is in regard to the conveyance, or the agreement, being void by reason of the statute of frauds. I sufficiently disposed of that part of the issues during the trial. My idea is that the bankrupt never at any time had any interest in that property.

Now, during the trial the case of Jersey Packing Company was cited and relied upon as authority for the fact that a bankruptcy proceeding acts as an attachment of the property and the property has to pass into the hands of the trustee regardless of the rights of other people.

The case of the York Manufacturing Company v. Cassell, decided in 1905, previous to the amendment of the Bankruptcy Act. I can state the facts: The case is where the York Manufacturing Company have made a conditional sale of property to the bankrupt and then bankruptcy intervened. This agreement was not filed and it was claimed the property should pass into the hands of the trustee and the York Manufacturing Company could not take it. The decision of Justice Peckham is as follows:

"We come, then, to the question whether the adjudication in bankruptcy was equivalent to a judgment, attachment or other specific lien upon the machinery. The Circuit Court of Appeals has held herein that the

seizure by the court of bankruptcy operated as an attachment and an injunction for the benefit of all persons having interests in the bankrupt's estate.

"We are of opinion that it did not operate as a lien upon the machinery as against the York Manufacturing Company, the vendor thereof. Under the provisions of the Bankrupt Act the trustee in bankruptcy is vested with no better right or title to the bankrupt's property than belonged to the bankrupt at the time when the trustee's title accrued. At that time the right as between the bankrupt and the York Manufacturing Company was in the latter company to take the machinery on account of default in the payment therefor. The trustee, under such circumstances, stands simply in the shoes of the bankrupt, and, as between them, he has no greater right than the bankrupt. This is held in Hewit v. Berlin Mach. Works, 194 U. S. 296, 48 L. ed. 986, 24 Sup. Ct. Rep. 690. The same view was taken in Thompson v. Fairbanks, 196 U. S. 516, 49 L. ed. 577, 25 Sup. Ct. Rep. 306. It was there stated that 'under the present Bankrupt Act, the trustee takes the property of the bankrupt, in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it, and subject to all the equities impressed upon it in the hands of the bankrupt.' "

Cites authorities. This case goes ahead:

"The remark made in Mueller v. Nugent, 184 U. S. 1, 46 L. ed. 405, 22 Sup. Ct. Rep. 269, 'that the filing of the petition (in bankruptcy) is a *caveat* to all the world, and in effect an attachment and injunction,' was made in regard to the particular facts in that case. The case itself raised questions entirely foreign to the one herein arising, and did not involve any inquiry into the title of a trustee in bankruptcy as between himself and the bankrupt, under such facts as are above stated. The dispute in the Mueller case was whether the court

in bankruptcy had power to compel, in a summary way, the surrender of money or other property of the bankrupt, in the possession of the bankrupt, or of someone for him, without resorting to a suit for that purpose. This court held, as stated by the chief justice in delivering its opinion: 'The bankruptcy court would be helpless indeed if the bare refusal to turn over could conclusively operate to drive the trustee to an action to recover as for an indebtedness or a conversion, or to proceedings in chancery, at the risk of the accompaniments of delay, complication and expense intended to be avoided by the simpler methods of the Bankrupt Law.' It was held that the trustee was not thus bound, but had the right, under the facts in that case, to proceed under the Bankrupt Law itself and take the property out of the hands of the bankrupt or anyone holding it for him.

"In this case, under the authorities already cited, the York Manufacturing Company had the right, as between itself and the trustee in bankruptcy, to take the property under the unfiled contract with the bankrupt, and the adjudication in bankruptcy did not operate as a lien upon this machinery in favor of the trustee as against the York Manufacturing Company."

In Hiscock v. Varick Bank, 206 U. S., page 40, say nothing upon the right of the trustee to take the property whether or no; it says:

"Section 57h provides: 'The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors or by such creditors and the trustee, by agreement, arbitration, compromise, or litigation, as the court may direct, and the amount of such value shall be credited upon such claims and a dividend shall be paid only on the unpaid balance.'

"The court was by this subdivision empowered to direct a disposition of the pledge, or the ascertainment of its value, where the parties had failed to do so by their own agreement. It is only when the securities have not been disposed of by the creditor in accordance with his contract that the court may direct what shall be done in the premises. Of course, where there is fraud or a proceeding contrary to the contract, the interposition of the court might properly be invoked.

"According to the terms of the bankrupt act the title of the bankrupt is vested in the trustee by operation of law as of the date of the adjudication. Act of 1898, 70 a, e. By the act of 1867 (14 Stat. at L. 522, chap. 176) it was provided that as soon as an assignee was appointed and qualified the judge or register should, by instrument, assign or convey to him all the property of the bankrupt, and such assignment shall relate back to the commencement of the proceedings in bankruptcy, and, by operation of law, shall vest the title to such estate, both real and personal, in the assignee. But 70a of the act of 1898 omits the provision that the trustee's title 'shall relate back to the commencement of the proceedings in bankruptcy,' and explicitly states that it shall vest 'as of the date he was adjudged a bankrupt.' When the petition in the present case was filed the bank had a valid lien upon these policies for the payment of its debt. The contracts under which they were pledged were valid and enforceable under the laws of New York, where the debt was incurred and the lien created. The bankruptcy act did not attempt, by any of its provisions, to deprive a lienor of any remedy which the law of the state vested him with."

At page 24 is another case in point, in the same volume, 206, in reviewing this York Manufacturing case, it says that it is held that a conditional sale was

valid under the laws of Ohio except as to a certain class of creditors and if there were no such creditors there was no one who could question the validity of the instrument; that the adjudication in bankruptcy did not give the trustee the right to do so because in that case the adjudication did not operate as the equivalent of a judgment or attachment or other specific lien upon the property.

Now, the plaintiff in this case asserts they have got a right to take possession of this property and turn it over to the trustee and then if the owner of the property wants it, he has got to go to an officer of the court, to-wit, the referee in bankruptcy, and litigate his rights. The only claim that the bankrupt had to this property was a contract of agency. This contract of agency gave the right of possession of the property to the bankrupt and the plaintiff claims that right of possession should pass to his trustee and the trustee would have a right to carry out this contract of agency. Now, I am of the opinion that the bankruptcy intervening, insolvency intervening, did away with the agency. It annulled the contract of agency and when that occurred the owner of the property had a right to take possession of it. There is a question in this case as to whether or not possession was in the bankrupt at the time of the bankruptcy. It is not a question that is necessary to decide at this time but the court necessarily doubts very much whether the bankrupt had possession of that property.

Now, plaintiff claims the bankrupt was entitled to the possession in order that he might assert some lien on the property, or the trustee assert some lien on the property—that is, they claim it belonged to the bankrupt who was caring for the property and working upon it. Now, that claim is wholly imaginary. The contract of agency provided these agents shall do all

they do for nothing. They shall have no claim whatever against the owner of that property for anything they do for that property, for keeping it, for trying to sell it, for touching it up—it was some pictures—improving them, putting new frames on them—they were to do all that without compensation and without reward. Now, in this case there is absolutely no evidence any one has got any claim to that property.

Assuming I am wrong in regard to the agency being revoked by this bankruptcy, the time in which these agents had to sell expired more than a year ago and the trustee now, if he got possession of it, could not perform the contract because the contract had expired. It is absolutely a moot question. If the trustee has any claim for damages against the owner of this property for taking it, it is not asserted in this case and the whole case is a moot case in my opinion and the bill will be dismissed.

No. 2721

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

Frank M. McKey, Trustee in Bankruptcy of the Estate of Tomlinson-Humes, Incorporated, Bankrupt,

Appellant,

vs.

Eli P. Clark and Los Angeles Warehouse Company, a corporation,

Appellees.

BRIEF IN BEHALF OF APPELLEES.

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HARTLEY SHAW,
Solicitors for Appellees.

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FOR THE NINTH CIRCUIT.

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Appellees.

BRIEF IN BEHALF OF APPELLEES.

STATEMENT OF THE CASE.

The statement of the case by appellant in his opening brief is in the main correct, as far as it goes, and such corrections as we wish to make therein can be more conveniently discussed in connection with the various points to be made. We add here, however, the fact that Tomlinson-Humes, incorporated, the bankrupt,

was, prior to its bankruptcy, engaged in the business of dealing in high priced books and valuable works of art, and for that purpose maintained a salesroom in the city of Chicago, Illinois, and had a force of expert salesmen, restorers of pictures, etc., designated as the Art and De Luxe Sales Department. When it became bankrupt, of course, this organization was disrupted and all business stopped.

Appellant says that the pictures in question were offered for sale by the bankrupt to Senator W. A. Clark; but there is no evidence that Senator Clark ever was informed or knew that the bankrupt had anything to do with the pictures. He was informed, however, when the pictures were shown to him and left in his house that they belonged to the defendant E. P. Clark [Tr. p. 90].

The evidence shows that when the contract of March 28th, 1912, was made between Tomlinson-Humes and E. P. Clark, the pictures were still the property of Thomas Myers. Myers was not paid for them until May 11th, 1912, and did not sign the bill of sale of the pictures until that time. Prior to that date the bankrupt had nothing from Myers except a so-called option which could not be found in order to produce it at the trial, but which is said to have contained a power to sell and convey, as well as an option to purchase. However that may be, there is no showing that Tomlinson-Humes had ever attempted to exercise the option to purchase at any time prior to May 11th, 1912. [See testimony of Tomlinson, pages 47-53, 67-70, of the transcript; McArdle, pages 83-85.]

POINTS.

1. The validity of a sale or transfer of personal property is to be determined by the law of the place where the property is situated at the time. If the contract of March 28th, 1912, is a present sale, the place is Illinois; but if the transaction of May 11th, 1912, constitutes the sale, then the place is New York.

2. The agreement between Tomlinson-Humes and Clark of March 28th, 1912, was not fraudulent or void as against the creditors of Tomlinson-Humes, because:

(a) If it was a present sale, it was a sale by Myers to Clark, and hence not in fraud of the creditors of Tomlinson-Humes.

(b) It was not a present sale, but a mere executory agreement for a sale to be consummated in the future.

(c) It was not void by the law of Illinois, where the property was situated at the time.

3. The title of the paintings in question passed from Myers to Clark, in New York, by virtue of the transaction of May 11th, 1912, and the creditors of Tomlinson-Humes are not concerned with that transaction.

4. The transaction of May 11th, 1912, was not fraudulent or void against creditors under the laws of New York, where the property was then situated.

5. The agency of Tomlinson-Humes, incorporated, was not coupled with an interest, and was revoked by its bankruptcy.

6. Tomlinson-Humes, after its bankruptcy, had neither title, possession, nor the right to the possession, of the paintings, and hence no rights in them passed

to the trustee; the bankruptcy court never had the custody or control of them, and Clark might lawfully take possession of them.

I.

The validity of a sale or transfer of personal property is to be determined by the law of the place where the property is situated at the time. If the contract of March 28th, 1912, is a present sale, the place is Illinois; but if the transaction of May 11th, 1912, constitutes the sale, then the place is New York.

There has been some difference of opinion as to the law applicable when a question arises as to the validity of a sale of chattels under such circumstances as are disclosed in the case at bar. But the law is now well settled as we have stated it above.

In the case of *Hervey v. R. I. Locomotive Works,* 93 U. S. 664, 671, the rule is stated as follows:

> "Every state has the right to regulate the transfer of property within its limits, and whoever sends property to it impliedly submits to the regulations concerning its transfer in force there, although a different rule of transfer prevails in the jurisdiction where he resides. He has no absolute right to have the transfer of property lawful in that jurisdiction respected in the courts of the state where it is found, and it is only on a principle of comity that it is ever allowed. But this principle yields when the laws and the policy of the latter state conflict with those of the former."

In the case of *Smith v. N. Y. Life Insurance Co.,* 57 Fed 133 (before Judge McKenna, sitting as district judge in the northern district of California), there was

involved the validity of an assignment of a life insurance policy, which was found in California after the death of the insured and sued upon there, although the deceased lived and died in Illinois. Judge McKenna held that the policy was property in California, and that the validity of an assignment of the policy made in Illinois by the deceased to another person living in Illinois, was to be determined by the law of California, and that as the assignment appeared to be in fraud of creditors, it was void under the California law, citing as authority the case of *Green v. Van Buskirk,* 7 Wall. 139.

In the article "Sales," 35 Cyc. page 93, the rule is thus stated:

> "The validity of a transfer of chattels as against creditors and subsequent purchasers, will be determined by the law of the state where the chattels are located."

In the first volume of Wharton on Conflict of Laws, 3rd Ed., Secs. 311a, 311c and 311e, this subject is discussed and the following statement of the rule is made:

> "When the cases above cited are considered together, and those that apparently refer the question to the *lex loci contractus* are considered in the light of the fact that the property involved was at the time of the sale located in the state where the sale was made, they seem to justify the statement that the necessity of a delivery of possession in order to protect the purchaser of personal property against subsequent *bona fide* purchasers from or creditors of the vendor is to be determined, neither by the *lex domicilii* nor *lex loci contractus*

> as such, but by the law of the place where the property is located at the time of the original sale."

The same conclusion is declared in a note to 64 L. R. A. 831.

In note in 11 L. R. A. (N. S.) 1007, upon the same subject, the rule is thus stated:

> "The validity of a sale or mortgage of personal property as affected by the question of fraud against the creditors of the seller, in general, depends on the law of the place where the property is situated at the time of the sale, and not on the law of the place where the contract is made."

In the case of *Schmidt v. Perkins,* 67 Atl. 77, 11 L. R. A. (N. S.) 1007, to which the above note is appended, the Supreme Court of New Jersey held that a transfer of property situated in New Jersey, which transfer was made in Iowa by an Iowa corporation to residents of Iowa, was void as to creditors under the law of New Jersey, and said:

> "The title to tangible personal property is ordinarily governed by the law of its *situs.* The maxim *mobilia personam sequuntur* states a mere fiction of law which it is sometimes necessary to apply in order to do justice, but it ought not to be extended beyond that necessity."

We might produce other authorities along this same line, but the foregoing seems sufficient to show the established rule, and we do not desire to prolong this brief by unnecessary citation of authorities. In view of this rule the law of California, cited by appellant, is entirely immaterial.

II.

The agreement between Tomlinson-Humes and Clark of March 28th, 1912, was not fraudulent or void as against the creditors of Tomlinson-Humes, because

(a) If it was a present sale, it was a sale by Myers to Clark, and hence not in fraud of the creditors of Tomlinson-Humes;

(b) It was not a present sale, but a mere executory agreement for a sale to be consummated in the future;

(c) It is not void by the law of Illinois where the property was situated at the time.

(a) If the contract of March 28th can be construed as a present sale, then the title passing thereby must have passed from Myers to Clark. The agreement between Myers and Tomlinson-Humes, referred to as an option, authorized Tomlinson-Humes to sell and convey the paintings. It therefore had a double aspect, authorizing Tomlinson-Humes to buy the pictures from Myers for certain prices, or to sell them for him. The exercise of the option by the purchase of the pictures would involve the payment of the price, and thereupon a conveyance of the paintings by Myers to the party so exercising the option. This had not been done on March 28th. The exact terms of the option are not before the court, but the use of the word "option" imports some agreement by which title would not pass until the option had been exercised and the price paid. If there was anything more in this option the burden was upon the appellant, as the plaintiff, to establish it. In its other aspect the so-called option was really an agreement of agency. It constituted Tomlinson-Humes the agents of Myers to sell and

convey the paintings. Anything done by them for that purpose was done as agents of Myers. They could not sell and convey otherwise than in Myers' behalf, for as agents they had no title, and they had acquired none under the option. Their possession of the paintings was not in their own right, and was in law the possession of Myers. Hence, if any title passed by the contract of March 28th, it necessarily passed from Myers, and the sale was necessarily a sale made by Myers through Tomlinson-Humes as his agents to Clark. The fact that the contract was not made in the name of Myers, but purported to be the contract of Tomlinson-Humes, does not affect this conclusion. An agent may act in his own name, and his acts, if done within the scope of his authority, are binding on his principal.

31 Cyc. 1416;
Salmon Falls Mfg. Co. v. Goddard, 14 Howard 446;
S. P. Railway Co. v. Von Schmidt, 118 Cal. 318.

Such a transaction, constituting a sale from Myers to Clark, could be attacked only by the creditors of Myers, under the law either of California or Illinois. This is apparent from the language of Sec. 3440 of the Civil Code of California quoted by appellant. When that section speaks of the seller having possession or control of property, it means, of course, possession or control in his own right as owner and not mere possession as agent, which is deemed in law the possession of the principal. The statement of Illinois law quoted from *Dooley v. Pease,* 180 U. S. 126, is equally clear on this point.

It has been held that by the law of California, a sale under the circumstances appearing here would not be void even against the creditors of Myers. *Williams v. Lerch,* 56 Cal. 330. The plaintiff, however, represents only the creditors of Tomlinson-Humes, and as the transaction, if amounting to a present transfer, was not a transfer made by Tomlinson-Humes, the plaintiff has no concern with it and cannot attack it.

(b) The agreement in question is set forth in full at pages 53 to 62 of the transcript. Appellant claims that it constitutes a bill of sale transferring title to the property and quotes a statement of the witness Thurber that "We then went to the coast, to Los Angeles, and sold them to Mr. E. P. Clark." This statement of Thurber may be of some value as a narrative of events, but the court is not bound by his construction of the contract as being a present sale, even if he meant to express such an opinion, which is doubtful. In construing the contract the court must consider its language and also the surrounding circumstances and the conduct of the parties under it. This contract purported to be made by Tomlinson-Humes and E. P. Clark as the only parties to it, and appellant quotes some language from it which is in the present tense, as if a present sale passing the title from Tomlinson-Humes to Clark were contemplated. But this language is not conclusive of the matter.

> "While certain terms and expressions standing alone import an executed or executory contract, they are by no means conclusive, but must be construed with reference to other provisions of the contract and according to what appears to have

> been the real intention of the parties, and so a mere recital in the writing evidencing the contract that the article is 'sold' or that the buyer has 'purchased' it does not necessarily make the contract executed."
>
> 35 Cyc. 276.

The fact is that at the time this contract was made the paintings belonged to Myers, and Tomlinson-Humes had no title to them. It is evident, therefore, that viewing the contract as one solely between Tomlinson-Humes and Clark, no title could pass by it, and this fact must have been known to the parties; for, as appellant says, the option is referred to in the contract and must have been before the parties. Why should they have intended the impossible?

In addition to the language quoted by appellant from the contract, it also contains this significant statement: "Whereas first party now has an option on fourteen (14) certain paintings from Thomas Myers, of Buffalo, N. Y., and second party hereby agrees to purchase same from first party" [Tr. pp. 53-54]. This language is exactly adapted to express the idea of an executory contract to be carried out later.

The contract is undoubtedly a peculiar one. It explains for itself in great detail why it is that Clark "hereby purchases" the paintings and "herewith makes payment" for them, the explanation being that Tomlinson-Humes have discovered the paintings and brought the options to the attention of Clark and should be compensated therefor, and that they are to go to large expense in preparing a campaign for resale of the paintings and preparing the paintings for resale. The

contract also recites that Clark allows Tomlinson-Humes to make the profit represented by the difference between the price paid by Clark and "the price which they have to pay to Mr. Myers," thus indicating clearly that they were to pay Myers out of the funds provided by Clark.

Looking at this contract as a whole in view of the circumstances and situation of the parties the proper construction of it is that there was to be a transfer of title as soon as it could be had from Myers, and that Clark paid his money in advance because Tomlinson-Humes would have to use it to pay Myers for the paintings and thus get the title, and because Tomlinson-Humes had already rendered services to Clark which he deemed worthy of compensation in discovering the paintings and bringing the option to his attention.

Considering only the language of the contract of March 28th, 1912, the most that could be said in behalf of the plaintiff on the point now under consideration is that the contract is ambiguous, some portions of it looking toward a present transfer and some looking toward a future transfer of title. Under such conditions the following rule of construction has been adopted:

> "Where the parties to a contract have given it a particular construction, such construction will generally be adopted by the court in giving effect to its provisions. And the subsequent acts of the parties, showing the construction they have put upon the agreement themselves, are to be looked

to by the court, and in some cases may be controlling."

9 Cyc. 588;

Lowrey v. Hawaii, 206 U. S. 206, 222;

Pine River etc. Co. v. U. S., 186 U. S. 279, 290.

"In determining the meaning of an indefinite or ambiguous contract, the construction placed upon the contract by the parties themselves is to be considered by the court. It has been said that in order to render applicable the rule that contemporary construction of a contract by acts of the parties is entitled to great weight, it should appear with reasonable certainty that they were acts of both parties, done with knowledge and in view of a purpose at least consistent with that to which they are sought to be applied. In such a case the practical interpretation by the parties themselves is entitled to great, if not controlling, influence, in ascertaining their understanding of its terms. In fact, where from the terms of the contract, or the language employed, a question of doubtful construction arises, and it appears that the parties themselves have practically interpreted their contract, the courts will generally follow that practical construction."

6 R. C. L., pages 852-3.

2 Wharton on Contracts, Sec. 653, is to the same effect.

Turning now to the acts of the parties under the contract in question, we find that they undoubtedly supposed that the title to the paintings would pass by some subsequent transaction in which Myers should participate. No sooner was the contract made than

Humes, who acted for Tomlinson-Humes in making it, returned to Chicago [Tr. p. 72], and on April 10th, 1912, wrote Clark a letter from Chicago, in which he said:

"Inasmuch as it will take us several days to make our financial arrangements to pay Mr. Myers, it rendered it convenient for all parties to await Mr. Bennett's pleasure, and Mr. Bennett and I purpose going to Buffalo next week. I shall take our attorney with us to see that the transfer of title is properly made, and we will use every precaution to fully protect your interests in the matter and see that you get a clear and perfect title to the paintings." [Tr. p. 64.]

On May 3rd, 1912, Humes again wrote Clark from Chicago, saying:

"We have obtained sufficient money on your paper to pay Mr. Myers * * * We are leaving tonight for the east to make payment to Mr. Myers. We will have the transfer of the pictures made in a manner which will satisfy both Mr. Bennett and our attorney." [Tr. p. 66.]

Humes and Tomlinson before going to Buffalo told Mr. Bennett, who was Clark's agent and representative in the matter, that their attorney, Mr. McArdle, "was going along; that there were some matters regarding the title of the paintings that we wanted Mr. McArdle to look into, and as soon as he was satisfied that everything was all right and we were in shape to close the deal, we would wire Mr. Bennett that he should come up." [Testimony of Tomlinson, Tr. p. 67.] They also told Bennett that they were arranging for the negotiation of some notes with which to raise the money

necessary to purchase these paintings from Mr. Myers. [Bennett: Tr. p. 77.]

Before going to Buffalo, Humes told McArdle that he was going to Buffalo to complete the Clark contract; that by that contract Tomlinson-Humes were entitled to any reduction in price they could get from Myers, and therefore they did not want a transfer of title direct from Myers to Clark. McArdle told Humes that the way to do this was to have two bills of sale made, one from Myers to Tomlinson-Humes, and one from Tomlinson-Humes to Clark. [Testimony of McArdle: Tr. pp. 81-83.]

Evidently Tomlinson and Humes did not get away quite so soon as Humes had expected, but they arrived in Buffalo on May 10th, 1912, having with them, as Tomlinson said, a part of the money raised on the Clark notes. On May 11th, 1912, the deal was closed with a great deal of formality. Tomlinson and Humes first met Mr. Myers at his attorney's office and arranged the price that Myers was to receive for the paintings and drew up a number of documents for use in the transfer; then they went to the hotel where the paintings were situated. Tomlinson-Humes handed over the price of the paintings to Myers and received his bill of sale and the other papers in connection with the matter; then they went into the room where the paintings were, taking Mr. Bennett and Mr. Myers with them, and Mr. Myers went around to each one of the paintings and pointed it out and identified it to Bennett and gave a brief description of it; then the bill of sale from Tomlinson-Humes to Clark was added to the other papers, and the papers were all handed to

Bennett and he was formally told that the paintings were his and for him to take possession. [See testimony of Tomlinson: Tr. pp. 47-52, 69-70; Bennett: pp. 77-79; McArdle: Tr. pp. 83-85.]

After the deal was closed on May 14th, 1912, Humes wrote Clark a letter from Buffalo, telling in detail how on Saturday "we made the transfer of the pictures from Mr. Myers to us and from us to you." [Tr. p. 68.]

In view of the foregoing facts there is no possible chance for a doubt that the parties to the contract of March 28th, 1912, thought that some further and more formal act was necessary to convey the title of the paintings to Clark, and they acted on this belief in a very positive way and placed a construction upon the contract which the court should be slow to overturn.

Even if the agreement of March 28th were intended by the parties as a present transfer and bill of sale from Tomlinson-Humes to Clark, it could not have that effect for the reason above pointed out that Tomlinson-Humes had no title to transfer. Under such circumstances the agreement could not be anything more than a mere executory agreement, which would take effect as a present sale only at such future time as the title might be acquired by Tomlinson-Humes.

Benjamin on Sales, 6th Am. Ed., pp. 80-84;
Smith on Personal Property, p. 137;
Mechem on Sales, Sec. 202;
Maskelinski v. Wazsinenski, 20 N. Y. Sup. 533.

"As a rule there can be no sale; that is, there can be no transfer of the property in the goods, unless they are owned by the seller."

35 Cyc. 47.

"Where the seller has no title at the time of the sale, but subsequently acquires title, the title so acquired inures to the benefit of the buyer."

35 Cyc. 161.

"A contract of sale is necessarily executory, if at the time of the contract the property is not in existence, or has not been acquired by the seller, although it has been held that if the property has a potential existence the sale is not invalid, and that the property will vest in the buyer upon its coming into existence, or upon its acquisition by the seller."

35 Cyc. 276.

The laws of California and Illinois referred to by appellant do not apply to mere executory agreements of sale, but are limited by their terms to such agreements as operate to pass the title of the property affected. An agreement for a future sale is perfectly valid so far as creditors of the prospective seller are concerned without a change of possession. Of course if such agreement is not carried out by a transfer of title before the rights of creditors have attached, questions may arise as to how far it will be effective against them. But such agreement is in no way denounced as void by the statutes and laws in question. If the agreement is executed by a subsequent transfer, the rights of creditors depend upon the validity of that transfer. Such is the present case. If creditors of

Tomlinson-Humes have any rights in these paintings, they must be worked out under the transaction of May 11th, 1912; but, as we expect to show later, they have no such rights under that transaction.

(c) The agreement of March 28th is not void under the laws of Illinois. Appellant relies for a statement of that law upon a quotation from one decision of the United States Supreme Court, which was there concerned with only one phase of the matter. For further details we must resort to the statutes of Illinois and the decisions of the Illinois courts. There is no statute in Illinois like that of California declaring all sales made without change of possession to be conclusively fraudulent. As far as the statute is concerned the question is one of actual intent in every case. (See Sec. 4, Chap. 59, Illinois Rev. St. in Hurd's Rev. St. 1905, p. 1196.)

Section 5 of the same statute provides that Sec. 4 shall not affect the title of a purchaser for a valuable consideration, unless it appears that he had notice of the fraudulent intent of his immediate grantor. In this case there is no evidence of actual fraudulent intent on the part of Tomlinson-Humes or of any notice thereof on the part of Clark. There is no question that Clark paid an ample consideration for the transfer. It should therefore be regarded as valid under the statute above referred to.

However, notwithstanding the above statute, the courts of Illinois have declared a rule very much like that established by the statute of California. They have, however, made an exception to the rule as ap-

pears from the following quotation from the case of *Thompson v. Yeck*, 21 Ill. 73:

> "All conveyances of goods and chattels when the possession is permitted to remain with the donor or vendor, is fraudulent of itself and void as to creditors and purchasers, unless the conveyance itself stipulates for such retaining possession by the vendor or donor."

The exception made by this case is also stated and declared in the following cases:

Rozier v. Williams, 92 Ill. 187;
Bass v. Pease, 79 Ill. App. 308-313;
Lowe v. Matson, 140 Ill. 108.

Furthermore, by the laws of Illinois a delivery made subsequent to the transfer is sufficient if made before the rights of creditors attach. This is different from the California law where a subsequent delivery will not cure the difficulty.

Cruikshank v. Coggswell, 26 Ill. 366;
Frost v. Woodruff, 54 Ill. 155;
Huschle v. Morris, 131 Ill. 593.

Nor does the fact that the property, after being delivered to the purchaser, is subsequently returned to the seller, render the sale conclusively fraudulent and void. It is only a fact to be considered on the question of fraudulent intent and may be explained.

Brown v. Riley, 22 Ill. 46-51;
Wright v. Grover, 27 Ill. 426.

Applying these rules to the present case, we see that the contract of March 28th expressly provides that

the paintings shall be left in the possession of Tomlinson-Humes to sell as agents of Clark, hence the retention of possession by Tomlinson-Humes is consistent with the deed and the transfer is not void under the Illinois law. Again, the property was later delivered to Clark's agent, Bennett, at Buffalo, and was held by him for a time, and its subsequent return to Tomlinson-Humes, while it may be evidence of a fraudulent intent, does not in this case establish it. All the facts of the case show clearly that there was no fraud in fact, but this matter we will discuss later in connection with the New York law. Appellant claims this delivery to Bennett was fictitious, but this is not so. His possession was not of long duration, but it was real while it lasted. He had the room in the hotel, where they were, assigned to him, and arranged to store the paintings in the hotel vault that night. Although Tomlinson-Humes signed the receipt for the pictures on the day they were delivered to Bennett, he did not in fact re-deliver them until the next morning. [Testimony of Bennett: Tr. pp. 78-9; McArdle: Tr. p. 85; Tomlinson: Tr. pp. 52, 70-1.]

III.

The title of the paintings in question passed from Myers to Clark, in New York, by virtue of the transaction of May 11th, 1912, and the creditors of Tomlinson-Humes are not concerned with that transaction.

Although two bills of sale were passed at Buffalo, N. Y., by which the title apparently passed from Myers through Tomlinson-Humes to Clark, that fact is not conclusive as to the true character of the transaction.

The facts show that Tomlinson-Humes were a mere conduit. By the agreement of March 28th they had bound themselves to acquire for Clark the title of Myers, had received Clark's money for that purpose, and had made themselves his agents to deal with the paintings. That agreement was in effect an equitable assignment to Clark of the option held by Tomlinson-Humes. They could not acquire any title for their own benefit or in their own right from Myers, because they were Clark's agents and had bound themselves to have the title transferred to him, and hence any attempt on their part to deal with the title on their own account would be a fraud upon Clark. The parties clearly recognized the existence of this fiduciary relation between Tomlinson-Humes and Clark when they provided in the contract that Tomlinson-Humes could have the benefit of any reduction they could get from the option price. They knew that in the absence of such provision such a discount would go to Clark. The only reason for making the two bills of sale, which appear to carry the title through Tomlinson-Humes, was that they might obtain this discount. They seemed to fear that if the purchaser's name were disclosed, they might have trouble with Myers about the discount. [See testimony of McArdle: Tr. p. 82.] Under these circumstances the title never vested in Tomlinson-Humes at all. They were a mere conduit and their creditors could have no rights in the property.

> "Whenever one is a mere conduit, as where he purchases property in his name as the agent of another, with the latter's funds, and subsequently

conveys to him, there is no interest to which a judgment lien can attach."

Freeman on Judgments, Sec. 373.

A similar situation was disclosed in the case of *Zenda Mining & Milling Co. v. Tiffin,* 11 Cal. App. 62. In that case one Parlow entered into an agreement to sell and convey certain mining property to Cummings, and at the same time signed and acknowledged two deeds conveying the property to Cummings. On the same day Cummings entered into a contract with Bryson and others, which was in effect an assignment to Bryson of the contract secured from Parlow, Bryson agreeing to perform the covenants made by Cummings in that contract. As a part of the same transaction Cummings signed and acknowledged two deeds conveying the property to Bryson. Bryson paid to Parlow the cash payment under the contract and thereupon all the papers were deposited in escrow to be delivered to Bryson if he performed the conditions of the contracts. Bryson entered into possession, complied with the contract and received the papers, including the deeds, in March, 1904, and thereafter conveyed the property to plaintiff. The defendant had obtained a judgment against Cummings intermediate between the date of the contract and the date when Bryson received delivery of the respective deeds, and claimed that his judgment became a lien upon the property on the recording of the deed to Cummings. The court held, however, that the lien of the judgment did not attach to the property in Cummings' hands, saying:

"It may be admitted that delivery of the deeds conveyed to Cummings an apparent interest in

> the property, but it was nothing more than a naked legal title. Assuming that his interest, if any, acquired under the Parlow contract, did not pass to Bryson and associates on September 8th, prior to docketing of the judgment; nevertheless, they, Bryson *et al.,* paid the entire purchase price and the doctrine is well established that where land is purchased in the name of one person and the consideration is paid by another, the land will be held by the grantee in trust for the person furnishing the consideration. Whenever one is a mere conduit, as where he purchases property in his name as the agent of another with the latter's funds and subsequently conveys to him, there is no interest to which a judgment lien can attach."

The above case related to real property, but that cannot afford any ground for distinction favorable to appellant. The rules regarding transfer of property and formalities required therefor are stricter in the case of real estate than in the case of personal property, hence the principle declared in the above case should be applied even more strongly to personalty than to realty.

IV.

The transaction of May 11th, 1912, was not fraudulent or void against creditors under the laws of New York, where the property was then situated.

By the laws of New York no conclusive presumption of fraud against creditors arises from the fact that there is no change of possession of property sold. The New York statute regulating this matter is the Personal Property Law of 1909, which is substantially a

re-enactment of other statutes which were in effect at least as early as 1830. Section 36 of that statute provides in substance that a sale made without change of possession is presumed to be fraudulent against creditors, "and is conclusive evidence of such fraud unless it appear, on the part of the person claiming under the sale or assignment, that it was made in good faith, and without intent to defraud such creditors or purchasers." (See Wadham's Cons. Laws of New York, Vol. 4, p. 3026; Birdseye Cumming & Gilbert's Cons. Laws, Vol. 4, p. 4206.) Section 37 of the same statute provides that in such cases the question of the existence of a fraudulent intent is a question of fact and not of law. (Wadham, Vol. 4, p. 3026; Birdseye C. & G., Vol. 4, p. 4208.)

Construing this statute and its predecessors, the courts of New York have held that one claiming title to personal property under a sale unaccompanied by delivery and change of possession is not required by the statute of frauds as against the creditors of the vendor to show a valid excuse for leaving the property in the vendor's possession, but it is sufficient if he shows that the sale was made in good faith and without any intent to defraud creditors or subsequent purchasers.

Hanford v. Artcher, 4 Hill 271;
Mitchell v. West, 55 N. Y. 107.

It is also permissible in New York for the buyer to employ the seller to dispose of the property for him, provided it is done in good faith without intent to defraud creditors.

Preston v. Southwick, 115 N. Y. 139-151.

The buyer may also leave the property with the seller for the purpose of having him complete the manufacture of it. The fact that this was the reason for leaving the goods with the seller was held to be sufficient to rebut the statutory presumption.

Prentiss Tool etc. Co. v. Schirmer, 136 N. Y. 305-311.

The convenience of the seller (Bissell v. Hopkins, 3 Cow. 166-188), and the difficulty of making delivery (Clute v. Fitch, 25 Barb. 428), have been held sufficient reasons for leaving the property with the seller in New York.

Section 40 of the above mentioned Personal Property Law of 1909 provides that the statute does not affect or impair the title of a purchaser or incumbrancer for a valuable consideration, unless it appear that he had previous notice of the fraudulent intent of his immediate vendor. (Wadham, Vol. 4, p. 3027; Birdseye C. & G., Vol. 4, p. 4209.)

Acting on this section, the New York courts have held that a fraudulent intent on the part of the seller only, unknown to the buyer, where a consideration is paid, does not render the transaction void.

Leach v. Flack, 31 Hun. 605;
Parker v. Conner, 93 N. Y. 118;
Zodler v. Riley, 100 N. Y. 102;
Commercial Bank v. Sherwood, 162 N. Y. 310-321.

In the above cited case of *Zodler v. Riley,* it was held that one who gives his promissory notes in pay-

ment for personal property and afterwards pays one or more of the notes, is a purchaser for value.

In the case at bar there can be no question as to the entire good faith of the transaction, and appellant does not appear to question it. No evidence of any fraudulent intent was offered and the defendant Clark took the stand and denied that he either had or knew of any such intent, and stated that he had paid the notes given for the paintings. [Tr. pp. 95-96.] But even if he had not taken the stand, the whole transaction shows for itself that there was no intention to defraud the creditors of Tomlinson-Humes. There could have been no such intention, for Tomlinson-Humes did not own the pictures and acquired no title thereto by any of the steps which were taken, as we have already pointed out. Clark bought these pictures to resell at a profit. What would be more natural than that he should employ Tomlinson-Humes, who were dealers in paintings and works of art, to re-sell them for him?

Of course, to sell these paintings they must have possession of them in order to be able to exhibit them to prospective purchasers. Clark gave Tomlinson-Humes his notes for $125,000.00 in advance of receiving title to the paintings, so that they might be able to pay their expenses as they went along.

It is too clear for argument that the transaction was made in perfect good faith and is valid under the laws of New York, which as we have already shown must cover the matter.

We have referred to the laws of New York and

Illinois without proof, because the federal courts take judicial notice of the laws of all states in a case commenced in the federal courts.

Owings v. Hull, 9 Peters 607;
Hanley v. O'Donoghue, 116 U. S. 1, 6;
4th Nat'l Bk. v. Franklyn, 120 U. S. 751.

V.

The agency of Tomlinson-Humes, Incorporated, was not coupled with an interest and was revoked by its bankruptcy.

Appellant asserts that under the contract of March 28th, 1912, Tomlinson-Humes had an authority coupled with an interest. Consideration of this proposition involves an examination of the contract. As we have already said, it contemplated that the title of Myers to the paintings should be acquired and vested in Clark. This could be done at any time under the Myers option contract, and in contemplation of its accomplishment, the contract of March 28th goes on to provide that Clark "engages the services" of Tomlinson-Humes to resell the paintings for him, and employs Tomlinson-Humes "as his agents and brokers," and Tomlinson-Humes "accepts this employment and agrees to serve" Clark "as brokers and agents in the sale and disposition of said paintings." Clark is to have "the expert services" of Tomlinson-Humes and their organization for the resale of these paintings. Tomlinson-Humes is to have "the exclusive right and interest in all of said paintings, to sell and dispose of said paintings and each of them." There are detailed provisions as to the prices for which the paintings may

be sold and as to the manner in which Clark may terminate the agency in advance of the stipulated time. Tomlinson-Humes are to clean and restore the paintings and reframe them, if necessary, and to "use their best efforts" to resell the paintings, and are to keep them insured. They are to pay all expenses of any kind whatever which they may incur in connection with the paintings. As compensation they are to receive 50 per cent of the profits which Clark may make on the sale of the paintings, or certain stipulated sums which he may pay them to terminate the agency. There is nothing in the contract purporting or intended to give Tomlinson-Humes any interest in the paintings themselves. Their interest is only in the profits to be derived from a sale. If they fail to make a sale within the time limited, Clark may withdraw the paintings from sale without payment of any sum whatever, and they have no further rights in the matter. The provision that Tomlinson-Humes are to have the exclusive right and interest to sell, etc., does not give them an interest in the paintings nor make the power one coupled with an interest.

In the case of *Taylor v. Burns,* 203 U. S. 120, it was held that an interest in the property upon which the power is to operate, and not merely an interest in the exercise of the power, is essential to make a power of attorney one coupled with an interest so as not to be subject to revocation. In that case Burns gave Taylor a power of attorney in which it was stated that Burns "sells to the said party of the second part the said mining claims upon the terms and consideration follow-

ing." It was also provided that Taylor was to sell or negotiate the sale of these mines and was to receive as commission a portion of the excess over a certain limited price. Notwithstanding the use in the contract of the language quoted, the court held that the instrument was a mere power of attorney to sell; that the power was not coupled with an interest and was revocable.

That case appears to be decisive of the present on the point, but there are numerous other cases to the same effect.

Where the agent is authorized to sell property and receive as compensation a part of the proceeds or profits of the sale, his agency is not coupled with an interest and the power is revocable.

McMahon v. Burns, 216 Pa. St. 448, 65 Atl 806;

Schilling v. Moore (Okla.), 125 Pac. 487;

Fisher v. So. L. & T. Co., 138 N. C. 90, 50 S. E. 592;

Hall v. Gambrill, 92 Fed. 32.

In the case of *Farmers Loan & Trust Co. v. Wilson*, 139 N. Y. 284, 34 N. E. 784, 36 Am. St. Rep. 696, it was held that where an agent collects rents on commission his power is not coupled with an interest; that the interest must be an interest in the thing itself and the power must be ingrafted upon some estate or interest in the thing to which it relates, in order that the power may be coupled with an interest.

In the case of *Barr v. Schroeder,* 32 Cal. 609-617, it was held that a power is not coupled with an interest

unless the agent has an interest in the property upon which the power is to be exercised, and not merely an interest in the money to be derived from the exercise of the power.

To the same effect are the cases of

Brown v. Pforr, 38 Cal. 556;
Flannagan v. Brown, 70 Cal. 259;
Frink v. Roe, 70 Cal. 310.

Under the rule established by the foregoing authorities the power of Tomlinson-Humes in this case was clearly not coupled with an interest. Furthermore, their contract with Clark was not of an assignable character, for it involved the performance of personal services by Tomlinson-Humes and a relation of personal trust and confidence clearly existed between them and Clark. The contract provides that Clark "engages their services" and is to have their "expert services" to sell the paintings and that they will exercise their best efforts to make sales. Moreover, Clark entrusts to their care property for which he has paid $125,000.00, and authorizes them to sell and convey it and to collect the price, which is to be not less than $480,000.00. It is very clear that the personal element entered into the contract, and that Clark would not have made it if he had thought that it was assignable or that some one else could step into the shoes of Tomlinson-Humes and claim the right to perform it. Appellant in discussing this matter claims that the only element of personal skill involved is the retouching of the paintings and that that was done prior to the bankruptcy. But this claim as to the character of the con-

tract is erroneous. The element of personal choice necessarily entered into every one of the stipulations above referred to. It cannot be otherwise in an agreement where one of the parties engages the expert services of the other to sell works of art costing $125,000.00, entrusts their possession to that other party, and authorizes him to collect the price when they are sold.

> "Rights arising out of contract cannot be transferred if they are coupled with liabilities, or if they involve a relation of personal confidence such that the party whose agreement conferred those rights must have intended them to be exercised by him in whom he actually confided."
>
> Ark. etc. Co. v. Belden Mining Co., 127 U. S. 379, 388.

This case involved a contract by defendant to furnish ore in certain amounts and of certain quality, and under certain conditions and terms, to be assayed by the other party, and paid for according to the result of this operation, and it was held that the assignee of the other party could not compel the defendant to recognize him or to do business under the agreement.

Approved in

> Delaware Co. v. Diebold Safe Co., 133 U. S. 473, 488;
>
> Burck v. Taylor, 152 U. S. 634, 651.

> "An office involving fiduciary duties or an agency in which the *delectus personae* is the essence of the relation, is not the subject of a sale or assignment."
>
> Colton v. Raymond, 114 Fed. 869.

"The contracts involving the relation of personal confidence and such that the party whose agreement conferred those rights, must have intended them to be exercised only by him in whom he actually confided, are not transferable."

4 Cyc. 22.

"There are many property rights which are by the terms of their creation expressly or impliedly restricted to the person originally acquiring them, or which are by an express provision made non-assignable without the consent of the other party to their creation. The question of whether such rights are assignable must depend upon their nature and upon the terms of the contract upon which they are founded. If the contract calls for the exercise of personal skill or discretion, it is inalienable, and would therefore not pass to the trustee in bankruptcy."

5 Cyc. 351.

The contract of Tomlinson-Humes herein referred to, not being of an assignable character, did not pass to appellant as their trustee in bankruptcy. In discussing this matter appellant cites Sec. 653 of Remington on Bankruptcy to the point that contract rights are not impaired by the bankruptcy and the trustee may assume a contract relation of the bankrupt. This was merely a statement of the general rule in cases not affected by the principle we are now considering. But the rule in such cases as we have here is stated by Remington at Sec. 994 of the 2nd Ed. as follows:

"Uncompleted contracts for personal services or for the exercise of skill wherein trust and confidence are reposed or reliance had on skill, do not pass."

In the case of *In re McBride,* 132 Fed. 285, the District Court for the Southern District of New York held that a contract between an author and a publisher, a corporation, whereby the latter was to publish a series of works of the author, revise them as necessary, keep a supply on hand and properly advertise the works and diligently enter upon their sale throughout the country, was not assignable and did not pass to the trustee, for the reason that it involved a personal trust and confidence, notwithstanding that the publisher was a corporation.

Appellant also cites in this connection the California case of *Janin v. Browne.* That case involved quite a different state of facts. There the contract of Browne was in substance that he would guarantee to Janin a certain price for his house, which was to be built under Browne's supervision, and there was no power given Browne to convey the property or receive the proceeds of the sale; neither was there anything apparent in the contract indicating that Browne had a special skill in the selling of houses, or that there was any special reason for the sale to be made by him. Under these circumstances after the house was built it would make little difference who made the sale. The action was brought to enforce Browne's guarantee, so that the plaintiff had waived whatever right he might have to object to the performance of the contract by the administrator.

In the case of *Husheon v. Kelly,* 162 Cal. 656, also cited by appellant, it is said that the rule that contracts to perform personal acts are discharged by the

death or disability of the person who was to perform the acts does not appiy where the services are of such a character that they may be as well performed by others. But this case did not involve the question of agency, and the statement itself was a mere passing remark, and does not in any event cover such a case as the present.

Both of those cases involved the question of revocation or termination of a contract by death of the part and not by his bankruptcy. There is good reason for a difference in the two cases, especially when financial responsibility is in question. After the death of a party his estate may be in sound financial condition, but in case of bankruptcy the trustee necessarily has an insufficiency of assets to meet the liability.

The rule is well established as to the effect of bankruptcy on the authority of an agent. It is revoked by the bankruptcy, especially in such cases as this where his pecuniary responsibility is important.

> "The bankruptcy of a business agent, as for example an agent appointed to sell merchandise, or to receive payment for money due his principal, operates as a revocation of his authority."
>
> Mechem on Agency, Sec. 267.

> "When one appoints another to act as agent, it is generally presumed, especially in cases where the handling of funds or property is necessary, that he appoints a certain one because he believes the latter responsible for any loss or damage sustained by his misconduct or neglect of duty. For this reason it is a general rule of law that an

agent's authority is usually terminated by his bankruptcy."

1 Clark & Skyles on Agency, Sec. 190, p. 450.

"When the agency is such as to render the agent's solvency necessary to the due and faithful performance of the act, as where he is authorized to receive the principal's money, or to sell his property, the authority will generally be terminated by the agent's bankruptcy."

Reinhard on Agency,, Sec. 178.

"The insolvency of the agent will ordinarily put an end to the agency, at least if it is in any way connected with the agent's business which has caused his failure."

31 Cyc. 1312.

"The bankruptcy of the agent revokes his authority except where the act to be performed by the agent is merely formal."

1 Enc. of Law, 2nd Ed. 1227.

In the case of *Audenried v. Betteley,* 8 Allen (Mass.) 302-308, a contract was involved by which the plaintiff engaged one H. to sell coal and wood for the plaintiff on commission, the coal and wood to be shipped by the plaintiff to H. and remain in his possession until sold. H. became insolvent and made an assignment of all his property in insolvency to the defendants. It was held that H. was the agent or factor of the plaintiff; that his agency was terminated by his insolvency and that the defendants had no right to the property remaining on hand or to the accounts payable for such part of the property as had previously

been sold, unless the agent had some unsatisfied claim against the principal for which as a factor he would have a lien on the property.

In the case of *Cushman v. Snow,* 186 Mass. 169-174, the plaintiffs, who were manufacturers of woolen goods, engaged the defendants as their factors to sell plaintiffs' manufactures upon commission and collect the proceeds. This arrangement continued for some time, defendants making the sales in their own names, and thereafter defendants became insolvent. It was held that the insolvency of the factors terminated their agency and that the assignee in insolvency having collected accounts for plaintiffs' goods sold, the plaintiffs could recover the amount thereof from him.

In this case, therefore, as soon as Tomlinson-Humes became bankrupt, their authority and power to act for Clark in the matter of selling these pictures terminated. This necessarily terminated their right of possession, which was merely incidental to the power of sale. This occurred at least as early as the filing of the petition in bankruptcy against them. As their power terminated and their contract was not assignable and did not pass to the trustee in bankruptcy, the trustee therefore has no claim against or concern with the pictures. He could not in this case, as was suggested in the case of Audenried v. Betteley, assert any claim against the pictures for expenses incurred in connection with them, because the contract itself squarely states that all of these expenses are to be discharged by Tomlinson-Humes.

VI.

Tomlinson-Humes, after their bankruptcy, had neither title, possession nor the right to the possession of the paintings, and hence no rights in them passed to the trustee. The bankruptcy court never had the custody and control of them and Clark might lawfully take possession of them.

Appellant criticises the trial court for having based its decision upon the case of York Manufacturing Co. v. Cassell, 201 U. S. 344, which held that the trustee stands simply in the shoes of the bankrupt and has no greater right than the bankrupt. Appellant bases this criticism upon the amendment of 1910 to Sec. 47 (a) of the Bankruptcy Act, by which the trustee has all the rights of a creditor armed with process and can enforce any claim which a creditor could have asserted at the date of filing the petition, had such creditor been holding an execution levy on the property, if in the custody of the court, or had an execution returned unsatisfied, if the property is not in the custody of the court. The distinction claimed by appellant to exist depends on the correctness of his further argument that the transfer, which he says was made by Tomlinson-Humes to Clark of these paintings, was void against the creditors of Tomlinson-Humes. That argument we have already answered, and we believe we have shown that Tomlinson-Humes' creditors had no rights at all in the property by virtue of the transaction between Tomlinson-Humes and Clark. It is not claimed that they have any rights arising from any other source. Such claim could not well be made, for of course the mere possession of property by an

agent for the purpose of sale gives his creditors no rights against it, nor can the creditors of Tomlinson-Humes assert or enforce any rights against the property of Clark, in the absence of some dealing with the property which the law regards as fraudulent against them.

In the absence of rights which can be enforced by creditors, the amendments of 1910 do not affect the matter and the doctrine of York Manufacturing Co. v. Cassell is still controlling. Therefore since Tomlinson-Humes by their bankruptcy lost all rights in the paintings, it necessarily follows that the trustees acquired none. The law on this subject is stated in the 2nd edition of Remington on Bankruptcy as follows:

> "The subject of the trustee's rights and title to assets is three-fold; the trustee succeeds to the bankrupt's title and stands in his shoes and has the bankrupt's rights and remedies; and he also takes the property, in cases unaffected by any fraud of the bankrupt towards creditors, in the same plight and condition in which the bankrupt held it and subject to all equities and rights imposed upon it in the hands of the bankrupt, except where there has been some transfer or incumbrance of the property or seizure of it by legal process, void as against the trustees by some positive provision of the Bankrupt Act, although, as to property coming into the custody of the bankruptcy court, he takes it in such plight and condition only to the extent that some creditor would have taken it had such creditor held a lien by legal or equitable proceedings thereon and, as to

such property not in the possession of the bankruptcy court, held an unsatisfied execution."

Sec. 1137.

"Thus if no circumstances existed that would have entitled a creditor, under the state law, to avoid the contract of the bankrupt, or the lien upon his property, and if there was no preference nor lien obtained by legal proceedings within the four months preceding the bankruptcy and while the bankrupt was insolvent, then the trustee is bound and bound solely by the bankrupt's contracts and transfers."

Sec. 1143.

"That a trustee in bankruptcy occupies no better position than the bankrupt, except as to those matters especially excepted by the Bankruptcy Act, is well settled."

Galbraith v. Bank (C. C. A. 8th Cir.), 221 Fed. 386, 392.

Appellant also attempts to found an argument upon the provision of Sec. 70 (a) of the Bankruptcy Act, to the effect that the trustee is vested with title to all property which the bankrupt could by any means have transferred prior to the filing of the petition. The argument appears to be that under the contract of March 28th, 1912, between Clark and Tomlinson-Humes, the latter could at any time transfer the title to the paintings, therefore the title passed to the trustee and this title carries with it a constructive possession. Manifestly this argument places a construction on Sec. 70 (a) which it was never intended to bear. If appellant's construction of the section is correct, we

would have this remarkable result: If A, being the owner of valuable property, gives B a power of attorney to sell and convey it for him and B becomes bankrupt, the property in question vests in the trustee of B; and further, as the act appears to provide no means for the divesting of the property once it is vested, such property would be applied to the payment of B's debts. This would be a good thing for B's creditors, but A might think he had cause to complain. The courts, however, have refused to give such a construction to Sec. 70 (a).

In the case of *In re Wright-Dana Hardware Co.*, 211 Fed. 908-912, the Circuit Court of Appeals for the Second Circuit said, referring to the provision of Sec. 70 (a) above mentioned:

> "We do not, however, understand that this clause includes, or was intended to include, property in the hands of a bankrupt bailee or of a bankrupt agent who never had the title, but who may have had a right to sell the property for the benefit of his bailor or principal. It is impossible to give the act any such construction. The bailor cannot thus be divested of his title."

That case involved certain goods which were held by the bankrupt on consignment with a power of sale, which the trustee claimed passed to him under the Bankrupt Act.

In the case of *Dunlop v. Mercer*, 156 Fed. 545-550, the Circuit Court of Appeals for the Eighth Circuit had under consideration a contract of conditional sale by which goods were consigned to the vendee to be-

come his when paid for, and by which further he was empowered to sell them, but must hold the proceeds of such sale for the vendor. At the time of the bankruptcy certain goods consigned under this agreement were still in the possession of the bankrupt, and the court allowed the vendor to reclaim them, holding that the title did not pass to the trustee, and saying:

> "A trustee is not a purchaser for value. The 'property which prior to the filing of the petition he (the bankrupt) could by any means have transferred' within the meaning of this clause of Sec. 70, is property which he could by any means have transferred to another lawfully under the same terms that he transferred it by law to the trustee; that is to say, without consideration. It does not include the property of another which the bankrupt is authorized to transfer only on the condition that he sells it for value, or sells it and holds the proceeds for the owner."

In the case of *In re Coffin,* 152 Fed. 381, the Circuit Court of Appeals for the Second Circuit decided that property held by a bankrupt in trust for other persons, though the trust is secret and not disclosed by the records, does not pass to the trustee.

In the case of *In re Atcheson,* 170 Fed. 427, this court held that trust funds in the hands of a bankrupt when coming into the possession of the trustee must be refunded to the beneficiary so far as they could be identified. The funds there involved were the proceeds of the sale of consigned goods. While the argument there presented to the court was not exactly the same

as that of appellant here, yet the decision seems to be exactly contradictory of his contention.

In connection with his discussion of Sec. 70 (a), appellant also refers to the case of *Jersey Island Packing Co.,* 138 Fed. 625, decided by this court, as if it upheld his argument on the point. But the statement there made by the court was that the bankruptcy places the "property of the bankrupt" constructively in the possession of the bankruptcy court. This is quite different from saying that the property of a third person for whom the bankrupt is agent is also constructively in the possession of the court. The other statement quoted in that case by appellant, that there was no jurisdiction over the property in any other court than the court of bankruptcy, was directed to the facts of the case from which it appeared that no other court was attempting to exercise or claiming such jurisdiction. The opinion there expressly states that "the interest of the bankrupt" in property will pass to the trustee. In the present case there was no such interest to pass.

Finally, appellant claims that at the time of the bankruptcy of Tomlinson-Humes the paintings were in their possession; that by the filing of the petition they passed into the custody of the bankruptcy court, and Clark had no right to take possession of them without an order from that court; and that, therefore, they should be returned to that court for further disposition. If we are correct in our position as to the rights of the parties under the contract between Tomlinson-Humes and Clark, this would be a most vain and fruit-

less proceeding. The trustee might have the brief satisfaction of transporting these paintings from Los Angeles to Chicago and taking a look at them, but he would have nothing more. Having neither title nor right of possession acquired from the bankrupts, and no rights derived from creditors to enforce against these paintings, the trustee would be required by the bankruptcy court to return the paintings to Clark and the situation would be as we find it now. No wonder the trial court declared this to be a moot case.

But in fact at the time of the bankruptcy these paintings were not in the possession of Tomlinson-Humes. The petition in bankruptcy was filed July 17th, 1913. The last time the bankrupt or any of its representatives had had possession of these paintings was in February or March, 1913. About that time Seymour J. Thurber, who was then in the bankrupt's employ, took the paintings to the residence of Senator William A. Clark in New York City, in an effort to sell them to Senator Clark. Senator Clark, however, declined to consider them, whereupon Thurber left the paintings in Clark's residence and went away. The paintings remained in the residence of Senator Clark until they were shipped to defendant E. P. Clark in September, 1913. Appellant claims that Senator Clark was holding these paintings for the bankrupt, but there is no evidence to that effect in the record. The testimony regarding the circumstances under which the pictures were left was furnished by the witnesses Thurber [Tr. p. 73] and Rowcroft. [Tr. p. 90.] Neither of these witnesses testified that Thurber told Senator Clark at any time that he was representing

the bankrupt. Instead of that he stated that the paintings were the property of the defendant E. P. Clark. This Rowcroft asserts positively, and Thurber does not deny it.

This was in accordance with the instruction which Humes had given Thurber. [Tr. p. 94.] Moreover it appears from a letter written by Senator Clark to Professor A. Chattain, evidently just before the pictures were shown to the senator, that he had been informed by the professor that these pictures belonged to E. P. Clark and that "Mr. Turner" had a letter of introduction from E. P. Clark, the owner. [Tr. p. 86.] Evidently the name "Mr. Turner" is a typographical or other error for Thurber. Professor Chattain was authorized to make such statement to Senator Clark by the bankrupt. [Tr. p. 93.] Evidently it was a part of the bankrupt's whole plan for selling these pictures to Senator Clark to conceal from him their connection with the matter, and simply inform him that the pictures belonged to E. P. Clark, who was already known to Senator Clark.

When Senator Clark would not buy the pictures Thurber asked if they could be left there for a little while, and Clark told him if he could arrange the matter with Rowcroft, who was in charge of the house, it would be all right. Thurber thereupon left the pictures with Rowcroft and never had them back after that, as he states himself. Thurber says that he wrote Mr. Rowcroft to deliver these pictures "on my written order only." There is no evidence, however, that such letters, if he wrote them, were ever received by Rowcroft or assented to by him. Nor does it appear that

in such letters he claimed to be representing Tomlinson-Humes. A mere holding for Thurber, under the impression that he represented E. P. Clark, would not be a holding for Tomlinson-Humes. As the agent of Tomlinson-Humes, Thurber could divest them of possession, and did so by leaving the paintings with a third party and informing him that they belonged to E. P. Clark, even though it might also be understood by such party that Thurber was the representative of E. P. Clark, and as such entitled to reclaim the paintings.

No receipt appears to have been given by Senator Clark or his employee Rowcroft for these pictures. The witness Humes says that he instructed Thurber to get a receipt for the paintings, but this instruction was issued after the paintings had been left at Senator Clark's residence, and there is no evidence that it was ever carried out. It appears, however, that Rowcroft was somewhat anxious to get rid of the paintings [Tr. p. 91]; that Bennett, who was Clark's agent in connection with these paintings, wrote to Rowcroft September 8th, 1913, asking him to ship the paintings to defendant E. P. Clark; also that E. P. Clark telegraphed to Senator Clark saying that the paintings were his and asking to have them shipped to him. In compliance with these requests from E. P. Clark and Bennett the paintings were shipped to E. P. Clark at Los Angeles, California. [Tr. pp. 87-89, 91.]

It is impossible to conclude from the evidence that Senator Clark or his employee Rowcroft ever agreed or consented to hold these pictures for the bankrupt. The pictures were simply left in their possession with

the statement that they belonged to defendant E. P. Clark, and if it could be considered that they were holding them for anybody, manifestly it must have been for E. P. Clark. This conclusion is strengthened by the fact that delivery was made on E. P. Clark's order, without any question.

The witness Thurber made a statement, which is quoted by appellant, that the pictures remained continuously in the possession of the bankrupt from March, 1912, until they were removed from the residence of Senator Clark. This statement is manifestly nothing but a conclusion of the witness, which was in fact admitted over our objection, and which is entitled to no weight. He admits that he was not with the pictures during all the period of time he referred to, and states that he knows where they were during that time because he was in touch with the affairs of the company. This shows in itself that his knowledge is only hearsay and a matter of conclusion. He further admits that he did not see the pictures in Buffalo in May, 1912. [Tr. p. 74.] In fact, the testimony of the other witnesses shows he was not in Buffalo at all. Moreover, this witness is not a disinterested person, as is claimed by appellant. He is one of the petitioners in bankruptcy against Tomlinson-Humes, from which it necessarily follows that he must be a creditor of Tomlinson-Humes and therefore very much interested in having these pictures declared to be a part of the Tomlinson-Humes estate. His bald conclusion about the possession of these paintings should not be allowed any weight against the detailed statements of other witnesses.

We have, therefore, a case where the bankrupt did not at the time of the filing of the petition against it have the actual possession of the property in question, nor did it have the constructive possession thereof, but the same was in the possession of a third party who was holding same as the property of defendant Clark. The property was therefore not in the custody of the bankruptcy court and defendant Clark was entirely justified in taking possession of it.

Even if we assume that Senator Clark were holding this property for Thurber, and that Thurber was the representative of Tomlinson-Humes in the matter, yet Tomlinson-Humes did not have the actual possession, and under such circumstances as are disclosed by the record, could have no constructive possession. A right to the possession sometimes helps to establish constructive possession, but their right to the possession was derived only from the contract of agency entered into between them and E. P. Clark on March 28th, 1912. As we have already shown, their agency and right to possession terminated by their bankruptcy. Their bankruptcy occurred when they committed the act for which they were subject to be adjudicated a bankrupt, but perhaps the revocation of their authority would not occur until some formal steps were taken to declare the bankruptcy. Such a step was taken when the petition was filed against them. Appellant claims that this petition operated as a *caveat* and injunction against all the world from dealing further with the property of the bankrupts. If it had such an effect it must also have had the effect of putting an end to their agency. Therefore, at and after the filing of the peti-

tion the bankrupt had no right to the possession and could not therefore have a constructive possession by virtue of the holding of the paintings by William A. Clark, his only knowledge on the subject being that they were the paintings of E. P. Clark.

We believe that the foregoing discussion sufficiently covers all the questions involved in this case, and that it conclusively appears that the defendant E. P. Clark is the owner of the paintings in question and entitled to their possession, and the judgment should be affirmed.

Respectfully submitted,

HERBERT J. GOUDGE,

HARTLEY SHAW,

Solicitors for Appellees.

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No. 2721.

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

Frank M. McKey, Trustee in Bankruptcy of the Estate of Tomlinson-Humes, Incorporated, Bankrupt,

Appellant,

vs.

Eli P. Clark and Los Angeles Warehouse Company, a corporation,

Appellees.

APPELLANT'S CLOSING BRIEF.

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APPELLANT'S CLOSING BRIEF.

Upon first reading of respondent's able brief we were almost convinced and not a little alarmed by its plausibility, but upon a second reading we discovered that it is not a lion after all, but our old friend Fido—the Innocent Purchaser. The sum total of respondent's arguments go to establish that some court or cautious text-writer has at some time "played safe," by suggesting possible exceptions to the fundamental rules upon which we have based our appeal. It has

been said that cases can be found to prove any side of any issue, and with all respect to the ability and erudition of counsel, we suggest that although they have made of their case a truly enviable presentation, they have failed to meet the vital issues tendered by our opening brief.

Their first point, that the sufficiency of transfer as against creditors is to be determined by the situs of the property, is a valid general rule, certainly applicable to the question of the sale in Los Angeles, but we are not satisfied that this rule is broad enough to cover the New York transaction, for in that instance the property was taken from Illinois to New York, inspected by both parties, colorably and fictitiously held by the buyer for thirty minutes, and then brought back to Illinois. Can it be said that the rights of creditors in property which is thus en route from one jurisdiction to another are to be determined by the law of the state in which the property happens to be at the particular moment when a bill of sale is made? So far as the sale in California is concerned, we believe the *lex situs* is the proper test, and that is the law of Illinois. The May transaction in Buffalo was purely formal, for the purpose of executing further evidence of the sale and bill of sale made in Los Angeles, "and pursuant to the sale therein contained." [Tr. p. 50.]

Respondent next contends that the sale in Los Angeles was a sale by Myers to Clark, and hence not in fraud of the creditors of Tomlinson-Humes, but submits no authority or substantial argument in favor of

this position. He admits (Resp. Br., p. 9) that the option from Myers gave bankrupts authority "to buy the pictures from Myers for certain prices, or to sell them for him," and in the next breath insists that any sale made to Clark must have been made for Myers. An inspection of the first bill of sale to Clark clearly shows that this was not the case, but that bankrupts sold of their own right and in their own behalf. It must be evident that the double aspect of this option also involves a possibility of two relations: one, that of a purchaser from Myers, in which case bankrupts would pay Myers the fixed price of the option; the other relation, that of agent to sell for Myers, in which case they would be bound to hold all moneys received, in trust for Myers as their principal. The two positions cannot be confused and the court will recall that there is no evidence of any right of bankrupt to insist that Myers accept a certain price, except in the event that they exercised their option to buy for themselves. Bankrupt and Clark both knew this and carefully avoided the pitfalls of any fiduciary relation with Myers by wording the contract so that it would not appear to be a sale by bankrupts as agents, but a sale by bankrupts as the present owners of an equitable interest vested and indefeasible. The record shows that bankrupts had the right to sell and convey and they were in possession, and a purchaser from them could therefore acquire a good title and could have compelled delivery of possession and defended against Myers, who was estopped by his own deed from objecting to the validity of the transfer.

When bankrupts made the first bill of sale to Clark it operated as an election to assert their option and consider the property as purchased, and they thereupon became vendors in their own right. We note, moreover, that the statute of California makes conclusively fraudulent, in such case, not only sales by owners, but "if made by a person having, at the time, the possession or control of the property." C. C. Cal. 3440. And even though rules of comity may give effect to the Illinois statute for the purpose of determining the sufficiency of delivery, we bear in mind in testing the delivery, even in Illinois, that it is a question of constructive delivery under a contract conclusively presumed, where it is made to be "fraudulent and therefore void," and the test of the contract is the *lex loci contractus,* under which the contract was not voidable, but void as against creditors, though effective as a sale *inter partes.* Whatever the actual intent of the parties they knew that in California their sale was "conclusively fraudulent" as to creditors. Moreover, the possession of bankrupt, if he was an agent, was the possession of the principal, Myers, and Williams v. Lerch, relied upon by counsel, was based upon findings of "immediate delivery followed by an actual and continued change of possession." The case is misleading, and has been carefully avoided in subsequent decisions and never adopted.

> "The language relied upon by respondent, taken from the case of Williams v. Lerch, has been well and justly criticised."
>
> Murphey v. Mulgrew, 100 Cal. 547.

We think there is no doubt that on March 28th bankrupt was equitably seized of an estate in the paintings and transferred this estate on that day to Clark.

"When an agreement is made for the sale of an estate the vendor is considered as a trustee of the estate sold for the benefit of the purchaser, and the purchaser as a trustee of the purchase money for the vendor. The vendee is equitably seized of the estate and may therefore sell or charge it before the execution of the conveyance. This principle has been applied to estates under contract of sale, although an election to complete the purchase rests entirely with the purchaser."

21 A. & E. Encyc. 934.

The relation of principal and agent never existed as between Myers and bankrupt, but solely the relation of vendor and vendee. The facts are parallel to those in Robinson vs. Easton, 93 Cal. 80, in which the court adopted the ruling in Ex parte White L. R. 6 Ch. 397 in the following language:

"Goods had been consigned by Towle & Co. to Nevill for sale, and if sold, to be accounted for at a fixed price. Nevill sold the goods upon such terms and at such prices as he chose, and it was held that the moneys received by him upon such sales, and standing to his credit upon the books of his banker, were his own moneys, and did not belong to Towle & Co.; that the contracts of sale made by Nevill were made by him on his own account, and not as agent for Towle & Co., the court saying: "The business which Nevill carried on with the goods of Towle & Co. has been called a cotton agency business, and the word 'agency,' in its prima facie

sense, seems to imply the relation of principal and agent, and not of vendor and purchaser. But it has been admitted in the course of the argument, that there is no magic in the word 'agency.' It is often used in commercial matters where the real relationship is that of vendor and purchaser, and the question is, whether the dealings between Mr. Nevill and Messrs. Towle & Co. with reference to these goods resulted in the relationship of vendor and purchaser, or in the relationship of principal and agent." "If the consignee is at liberty, according to the contract between him and his consignor, to sell at any price he likes and receive payment at any time he likes, but is to be bound, if he sells the goods, to pay consignor for them at a fixed price and a fixed time, in my opinion, whatever the parties may think, their relation is not that of principal and agent. The contract of sale which the alleged agent makes with his purchasers is not a contract made on account of his principal, for he is to pay a price which may be different, and at a time which may be different, from those fixed by the contract."

In a very recent case in California we find the same ruling upon facts very close to those at bar. Defendant was a broker who had an agreement with the owner of a fee to sell to the broker at a certain price and an agreement with the plaintiff to buy from the broker at a certain price. The court reversed a judgment against the broker as an agent and said "It may well be that in the present case the difference between the amounts of the first payment called for by the two contracts of sale, viz, the sum of $400 remained in the hands of Rizzo as a principal." De Pavo vs. Rizzo, 20 C.A.D. 642.

Respondent argues that if the sale from bankrupt to Clark in Los Angeles was a present sale, it was a sale from Meyers to Clark, "and hence not in fraud of the creditors of Tomlinson-Humes." Counsel admit that bankrupt did have power to sell and convey and say that bankrupts' contract with Myers had "a double aspect, authorizing Tomlinson-Humes to buy the pictures from Meyers for certain prices, or to sell them for him." If this be true, we must determine which aspect the bill of sale of March 28 bears by inspecting its terms. It recites that the source of bankrupts' interest was an option to buy from Myers, and thereupon in express terms Clark purchases, not from Myers, but from bankrupt. Bankrupt, therefore, was not making a sale for Myers, but for bankrupt, and Myers never made a bill of sale to Clark, but made one to bankrupt. The bill of sale to Clark provided that bankrupt should dicker with Myers and attempt to get a concession upon the price and keep such concession, which no agent of any shade of honesty could do against his principal.

"It being understood that second party allows first party to make the profit represented by the difference between the price which they have to pay Mr. Myers and the purchase price herein named." [Tr. p. 56.] Bankrupt never allowed Myers to come in contact with Clark's agent until after bankrupt had acquired a bill of sale from Myers, but bankrupt became Clark's agent "from March 28, 1912, * * * hereby clothed with full power and authority to sell all of said pictures and each and every one of them as hereinbefore

provided, and to assign, transfer and deliver the same on making sale or sales and to receive and receipt for the purchase price thereof." [Tr. p. 61.]

Counsel argues (Brief, p. 9) that the exercise of the option would involve a payment of the price, but there is nothing in the record to show that payment of the price to Myers was a condition precedent, and there is no presumption that there was. Where one has an enforceable option and elects to exercise it, he is immediately vested with an equitable title to the property. All that the record shows about this option is that it gave bankrupts the power to sell and convey a good title, and respondent admits that it also authorized bankrupt "to buy the pictures from Myers for certain prices." (Resp. Br., p. 9.) It may be that Myers was not bound to execute a bill of sale to bankrupt until he received his money, but if so, this is outside the record, and it is of no importance, for the reason that a bill of sale is not essential to a transfer of personalty, and the question when title passes is to be determined from the intention of the parties as evidenced by their acts. We submit that the acts of the parties in Los Angeles clearly indicate that bankrupts considered they had an enforceable option, amounting to an absolute right, to the Hogarth pictures upon election to buy them, and that they thereupon sold to Clark, who "hereby purchases."

Two months later, when bankrupts made their second bill of sale to Clark [Tr. p. 50], it was made "subject to the terms of sale contained in the agreement of March 28, 1912, between the parties hereto

and pursuant to the sale therein contained." Certainly, if there is any distinction between an agreement to sell and an agreement of sale, the contract made in Los Angeles was an agreement of sale by its express terms, and was so denominated in the bill of sale thereafter made. Counsel for respondent even admit "some portions of it looking toward a present transfer." (Br. p. 13.)

We submit that as between Myers and bankrupt and Clark, title passed to Clark on March 28, in Los Angeles. That at least was the belief of both Clark and bankrupt, for Clark in the same instrument made bankrupts his selling agents from that moment, "clothed with full power and authority." [Tr. p. 61.]

> "Where a bargain is made for the purchase of goods and nothing is said about payment or delivery, Bailey, J., said the property passes immediately so as to cast upon the purchaser all future risk if nothing remains to be done to the goods, although he cannot take them away without paying the price."
>
> Hatch v. Standard Oil Co., 100 U. S. 124.

> "Contracts for the purchase and sale of chattels, if complete and unconditional and not within the statute of frauds, are sufficient as between the parties to vest the property in the purchaser even without delivery, the rule being that such a contract constitutes a sale of the thing."
>
> *Ibid.*

Respondent argues very confidently that the courts of Illinois have gone astray and failed to properly con-

strue their own statutes, but we need not take this contention seriously, as this court is bound as to the meaning of the Illinois statute by the construction put upon it by the Illinois courts. Counsel admits that the rule in Illinois is "very much like that established by the statutes in California. They have, however, made an exception to the rule." This exception counsel cull from certain chattel mortgage cases to the effect that the vendor may retain possession if the conveyance so stipulates. This rule has no bearing upon ordinary sales of chattels, but only upon such incumbrances as chattel mortgages and sales of bulk articles which are by law required to be evidenced in writing and filed for record. Thus, Thompson v. Yeck, cited as authority for this exception, brief, page 20, turned upon the sufficiency of the instrument under the chattel mortgage act of Illinois. In Huschle v. Morris, 131 Ill. 587, the court held delivery to be absolutely essential to a complete sale as against creditors. In Morris v. Coombs, 109 Ill. App. 176, it was held that the retention of possession by vendor is fraudulent *per se* as to creditors, and in Martin v. Duncan, 156 Ill. 274, in which a stock of goods in possession of an agent was sold and possession remained with the agent as an employee for the vendee, the court said that the possession of this third party before sale was the possession of the vendor, and that the character of possession continued to be the same after sale in the absence of a substantial and visible sign of a change of title, and that the sale was therefore void as against creditors.

Respondent argues at length that because bankrupts' attorney, McArdle, thought a bill of sale necessary and thought that the contract of March 28 was executory, therefore it must be so construed. If McArdle ever thought so, it was merely a mistake of law, and of no importance for our purposes. No formal acts or technical conveyances in writing were needed by Clark, and the conveyances in Buffalo were doubtless made in order to add importance and glamour to the already voluminous history of these paintings in the eyes of the next purchaser. The "subsequent transfer," which looms so large in respondent's brief, was an empty and idle act, which merely provided added evidence for the purposes of a chain of paper title.

This brings us to the discussion of the assertion that title passed in New York. Respondent has failed to show a valid transfer as against creditors in California or in Illinois and struggling to the surface for the third time, grasps at the slender straw of a supposed weakness in the New York statute of frauds. We have endeavored to show that bankrupt was in this case, not an agent of, but a purchaser from Myers and a vendor as to Clark at the time of the sale in Los Angeles. The execution of the second bill of sale in New York merely served to evidence a status already attached to the property. Respondent now asserts that title passed in New York from Myers through bankrupt to Clark and cites certain authorities concerning the purchase of real estate by trustees to show that such trustees are mere conduits, having no real title to the property. They admit that this is

a technical rule of real property, consequent upon the theory of resulting trust and cite only the case of Zenda M. & M. Co. v. Tiffin, 11 Cal. App. 62, a case in which we find a great deal of comfort. In that case, a contract for a deed was entered into in September. Cummings, the prospective grantor did not acquire title until the following February. In the meantime, a judgment had been docketed against Cummings. The court said:

> "Appellant does not claim that he (Cummings) owned the property at the time of the docketing of the judgment, but contends that he subsequently acquired 26/48 interest. Whatever interest Cummings acquired was by virtue of the Parlow agreement pursuant to which, Parlow signed and acknowledged deeds to the property, making Cummings grantee therein. * * * The rights of Cummings of whatever character or value were on September 8, prior to the docketing of the judgment, actually transferred to Bryson and associates. Thereafter Cummings had and could have no interest in the property. He had parted with all interest in or control over it."

So in the case at bar, bankrupt acquired no title or interest by the bill of sale from Myers, for as between bankrupt and Clark he had parted with his vested interest in the property by his bill of sale to Clark in Los Angeles. The personal property law of New York state, codified in 1909, chapter 45, sec. 36, provides:

> "A resale of goods and chattels in the possession or under the control of the vendor and every

assignment of goods and chattels by way of security or on any condition, but not constituting a mortgage, nor intended to operate as a mortgage, unless accompanied by an immediate delivery, followed by actual and continued change of possession, is presumed to be fraudulent and void as against all persons who are creditors of the vendor, or persons making the sale or assignment, including all persons who are his creditors at any time while said goods or chattels remain in his possession, under his control, or subsequent purchasers of said goods and chattels in good faith, and is conclusive evidence of said fraud unless it appears on the part of the persons claiming under the sale or assignment that it was made in good faith, and without intent to defraud said creditors or purchasers."

A subsequent amendment, Session Laws, 1911, chapter 571, sec. 107, provided:

"Where a person having sold goods continues in possession and such retention is fraudulent in fact or is deemed fraudulent under the rule of law, the creditor or creditors of the seller may treat the sale as void."

Unless this provision is inconsistent with sec. 36, quoted above, they are both to be considered as the New York law. Sec. 36 raises a presumption of fraud, whereas sec. 107 puts the burden upon the creditor alleging fraud. It is quite possible that a knowledge of this slight difference between the law in California and Illinois and that in New York brought about the arrangement by which the pictures were shipped to New York and the parties all met there

"with great formality" to make a colorable transfer of possession for thirty minutes. Respondent urges that the sale was made in New York, and that creditors cannot defeat it without showing fraud; but even if this were so, respondent admits that we have sustained this burden for he says (brief, page 31): "The property was later delivered to Clark's agent, then at Buffalo, and was held by him for a time and its subsequent return to Tomlinson-Humes, while it may be evidence of a fraudulent intent, does not in this case establish it." Sec. 107, quoted above, provides that even if retention is not fraudulent in fact, the sale is void as against creditors if it is "deemed fraudulent under any rule of law," and as we have seen that the rule of construction adopting the *lex situs* is merely a rule of comity, we may well say that we have here a legislative recognition, not only of the common law rule in regard to delivery, but of the right of a court in another jurisdiction to consider itself free under this clause to give effect to rules of law existing in the jurisdiction of that court, without infringing on the *lex situs*.

Respondent argues (Br. pp. 36 and 37) that the agency of the bankrupt to sell for Clark was terminated by the bankruptcy, and that bankrupts' possession of the paintings was merely incidental to the power of sale, and that their right of possession terminated as soon as the agency was terminated.

The court will observe that the possession of the paintings in the bankrupt was not merely incidental to the power of sale, but was a possession guaranteed to

them for a valuable consideration during a fixed time, and that it was therefore during that time an irrevocable power, and a possession of which they could not be deprived by any act of court. This being so, it does not fall within any of the citations set out so laboriously by counsel but within the express exception to that rule set out in these very citations. The exception to which we refer deals with agencies which are not revocable by the act of the principal.

The citation in 31 Cyc., page 1312, is followed by the words:

> "But the bankruptcy of the agent will not destroy any right he may have under a power coupled with an interest."

And we read upon the following page:

> "And where the power of attorney forms part of a contract and is security for money or for the performance of any act which is deemed valuable, it is generally made irrevocable in terms, and if not so is deemed irrevocable in law, and the power may be exercised at any time, and is not affected by the death of the person who created it."

But, as we have said in our opening brief, we do not care to be led afield into this discussion of whether the agency is or is not still alive, for we think it is not necessary to our rights in this case. The trustee does not sell by force of any agency, but as the representative of creditors vested with a lien amounting to an express interest in the property, a right *in rem*. It is this right in the *res*, this property in the paintings

themselves, which will be sold by the trustee, and not the right or interest of Clark, if he still has any. The sale will be a sale of the interest of the creditors in the property, and not any interest of Clark in the property. The trustee here claims an interest *in rem,* whereas the respondent thinks we are seeking to assert an interest *ad rem,* that is, a right to acquire an interest in the property rather than an acquired and vested interest in the property.

Much has been made of the contention that the appointment of bankrupts as selling agents imposed upon them a responsibility which was personal, and which involved a relation of peculiar confidence in their ability. There is no evidence before this court that there was any reliance on the part of Clark in any special or peculiar skill or ability in the bankrupt. If it can be said that any reliance of any character is shown, that reliance went only to the retouching, framing—experting, as the record calls it,—of these pictures, which the evidence shows was completed at the warehouse of bankrupt in Chicago before the pictures were removed to Buffalo. What remained to be done by bankrupt, as was said in Janin v. Browne, 67 Cal. 37, could be done as well by another as by the bankrupt, and it is the general rule, as set out in Husheon v. Kelly, 162 Cal. 656, that the theory of reliance upon a peculiar ability in the agent does not apply where the act to be done by the agent may as well be performed by others.

In the case at bar nothing remained to be done to the pictures except to sell them, and it has always been

held that a sale, whether of realty or personalty, is not a reliance upon peculiar ability of the agent in the absence of an express showing. Clark was upon the stand, but was not asked about this matter, and there is no testimony, either in the deposition of the evidence upon the stand, tending in the least manner to show any reliance upon peculiar ability of bankrupt.

Respondent cites *In re* Wright-Dana Hardware Co., 211 Fed. 908, to the effect that where property is in the possession of an assignee for sale, it is not to be deemed property which, under section 70(a) of the Bankruptcy Act the bankrupt might by any means have transferred, but in that case the bankrupt had no contractual right to possession, and he might be deprived of it at any time. He had no vested right of possession, no valuable consideration in the nature of a fixed term upon which he could insist, and which, as we have shown, would render the agency irrevocable. Moreover, the court says in that case:

> "But the trustee does not assert any fraud in this case; on the contrary, his counsel admitted in his argument that there had been no fraudulent transfer."

In the case at bar, however, we find a transfer which is deemed fraudulent at law, whether actual fraud exists or not, and the cited case is therefore not authority upon the point it is supposed to support.

The other federal cases cited by respondent were all decided before the amendment of 1910. In all of these cases there was no interest in the bankrupt which could

pass to his trustee before the amendment of the Bankruptcy Act, nor perhaps under the present law, but in the case at bar bankrupt had a valuable right, to-wit: the right to possession until the expiration of his contract, which right could not be taken from him by Clark, nor terminated by Clark's death, nor was that right terminated by the bankruptcy of Tomlinson-Humes.

Taylor v. Burns, 203 U. S. 120, is quoted to prove that in the case at bar, there is not a power coupled with an interest. In that case, an agent had power to "sell and negotiate" and this power was held to confer no title in the agent. The action was one to quiet title to mining claims and we again find counsel striving to find refuge in technical rules applying only to real property. The court said that "Nowhere in the instrument does the party of the second part assume any obligations." It was therefore an unilateral promise and a mere authority not coupled with an interest. The court relied upon Hunt v. Rousmanier, 8 Wheat. 174, in which Mr. Chief Justice Marshall had said:

> "Rousmanier therefore could not during his life, by any act of his own, have revoked this letter of attorney, but does it retain its efficacy after his death? We think it does not. We think it well settled that a power of attorney, if irrevocable during the life of a party, becomes extinct by his death. * * * A conveyance in the name of a person who was dead at the time, would be a manifest absurdity."

It must be apparent then that this case has nothing to do with the one at bar. The court there said that even this naked power was irrevocable during the life of the grantor, and even if the power at bar had been only a naked power, neither of these cases support any theory that bankruptcy would operate to revoke it. The bankrupt is still alive and may, if the trustee so elects, continue even the relation of agency, but as we have shown, the trustee herein is not limited by the rights of the bankrupt, but succeeds to all his beneficial powers. The appointment of bankrupt was not a mere possibility of acquiring a commission. It was a definitely beneficial interest conveyed upon valuable consideration upon the basis of which bankrupt expended money, which his creditors might otherwise have had, and many of his liabilities may have been incurred in carrying out this very contract.

None of the real property cases cited are in point here for the reason that possession gave bankrupt the indicia of ownership and gave rise to those elements of estoppel which are the basis of all of the substantive rules protecting creditors against sales which are either "fraudulent in fact or deemed fraudulent by any rule of law." Whatever form the facts in this case may take, it is impossible to avoid the conclusion that so far as creditors of the bankrupt are concerned, there was no time from March 15, 1912, when bankrupt first acquired possession, up to the time of the filing of the petition in bankruptcy, when bankrupt was not in possession, sole, irrevocable, exclusive, notorious and open, under a claim of title and with

a right to sell and convey so that as to all the world the property was that of the bankrupt. Myers knew this situation and Clark, the respondent, knew it, and both were willing to allow it to be believed that this was the property of the bankrupt in order that they might profit by a sale. Clark knew that bankrupt had long been in possession, yet he made a contract which was "conclusively fraudulent and therefore void," both where the contract was made in California, and at the place where the property was situated in Illinois; and then at a later date, his agent Bennett was shown the pictures in New York state and within thirty minutes gave up every color of even constructive possession by taking a receipt from the bankrupt. In that state, this sale was void if it was "fraudulent in fact or deemed fraudulent by any rule of law." And we submit that even if the rule of comity goes so far as to give any effect whatsoever to this unnecessary and futile second bill of sale in New York, it must appear that the sale there attempted to be made, was not only fraudulent in fact, because it was an attempt to take advantage of a supposed weakness in the Sales of Goods Act in New York state, but it is to be deemed fraudulent by rule of law, because it was not open and notorious and therefore as against creditors, both Myers and Clark are estopped to set it up. But whatever may be the rule governing this elusive sale, it is very apparent that creditors of the bankrupt estate may set up various rights in this property and those rights cannot be adjudicated in this proceeding in which they are not parties and in which the only issue

is right of possession. The express purpose of the amendment of 1910 to the Bankruptcy Act was to enable the trustees to be in the position of creditors in every jurisdiction, and of every possible complexion of claim. Whatever these various rights may be must be determined in a court of bankruptcy in which all of the creditors may be heard. In the meantime the trustee is to be regarded as a creditor, having a vested lien in the property. It is elementary that one in possession, claiming a vested lien has a right to hold for the satisfaction of his lien and therefore there is no state of facts here, under which Clark can justify his wrongful taking from the possession of the Federal Court in Illinois. Whatever rights Clark may have, he cannot be permitted to forceably remove property from the possession and custody of the Federal Court in Illinois, but must yield to the jurisdiction of that court and establish his claims in the proper manner in that forum.

The decree should be that the respondents deliver to the trustee in bankruptcy the pictures described in the bill of complaint, and held under the injunction herein.

Respectfully submitted,
MULFORD & DRYER,
WILBUR BASSETT,
Solicitors for Appellant.

No. 2723

United States

Circuit Court of Appeals

For the Ninth Circuit.

WILLIAM W. CRAWFORD, Trustee,

Appellant,

vs.

WASHINGTON NORTHERN RAILROAD COMPANY, a Corporation; OREGON-WASHINGTON TIMBER COMPANY, a Corporation; BLAZIER TIMBER COMPANY, a Corporation; MISSISSIPPI VALLEY TRUST COMPANY, a Corporation, Trustee; UNION TRUST COMPANY, a Corporation, Trustee; FRANK P. HAYS and WILLIAM C. LITTLE, Co-partners Doing Business as LITTLE & HAYS; —— HAYS; BRECKENRIDGE JONES, ELI KLOTZ, JAMES GROVER, JAMES E. BROECK, J. E. BLAZIER, E. J. BLAZIER, and JOHN A. PRESCOTT and D. L. ROBINSON, Co-partners Doing Business as JOHN A. PRESCOTT & COMPANY,

Appellees.

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Upon Appeal from the United States District Court for the Western District of Washington, Southern Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Counsel.

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WILLIAM H. HAYDEN, Esquire, Fidelity Building, Tacoma, Washington;

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JOHN McCOURT, Esquire, Corbett Building, Portland, Oregon,

J. C. VEAZIE, Esquire, Corbett Building, Portland, Oregon,

Solicitors for the Appellees. [1*]

In the United States District Court for the Western District of Washington, Southern Division.

No. 9–E.

WILLIAM W. CRAWFORD, Trustee,

Appellant,

vs.

WASHINGTON NORTHERN RAILROAD COMPANY, a Corporation; OREGON–WASHINGTON TIMBER COMPANY, a Corpora-

*Page number appearing at foot of page of original certified Record.

tion; BLAZIER TIMBER COMPANY, a Corporation; MISSISSIPPI VALLEY TRUST COMPANY, a Corporation, Trustee; UNION TRUST COMPANY, a Corporation, Trustee; FRANK P. HAYS and WILLIAM C. LITTLE, Copartners Doing Business as Little & Hays; ——— HAYS; BRECKENRIDGE JONES; ELI KLOTZ; JAMES GROVER; JAMES E. BROECK; J. E. BLAZIER; E. J. BLAZIER; and JOHN A. PRESCOTT and D. L. ROBINSON, Copartners Doing Business as JOHN A. PRESCOTT & COMPANY,

Appellees.

Praecipe for Transcript.

To the Clerk of the Above-entitled Court:

You will please prepare and certify to constitute the record on appeal in the above case, a transcript of the following, omitting all captions, endorsements, verifications, acceptances of service, etc., excepting on the first paper; the record to be printed in San Francisco, California.

1. This praecipe;
2. Amended bill of complaint; answer to same;
3. Cross-complaint of Wm. W. Crawford;
4. Answer to same;
5. Reply to cross-complaint;
6. Motion of Crawford to strike from amended complaint;
7. Order thereon;
8. Motion to strike from answer of Crawford, and order of Court thereon;

9. Motion to strike from cross-complaint of Crawford and order of Court thereon.
10. Judge's decision;
11. Final decree.
12. Petition for appeal;
13. Order allowing appeal;
14. Bond on appeal;
15. Assignments of error. [2]
16. Stipulation as to original exhibits.
17. Transcript of the evidence;
18. Order settling transcript of evidence.

KERR & McCORD,
Solicitors for Appellant.

Filed Nov. 2, 1915. [3]

[Title of Court and Cause.]

Amended Bill of Complaint.

To the Honorable the Judge of the Above-entitled Court:

Your orators bring this their amended bill of complaint pursuant to leave heretofore granted by the Court, and for cause of suit against the defendants above named, aver:

I.

That your orator, Mississippi Valley Trust Company, is now and at all of the times hereinafter mentioned has been a corporation, organized and subsisting under the laws of the State of Missouri, and empowered by its charter to administer trusts and to perform all of the offices, duties and functions assumed by it as hereinafter averred. That your orator is now and at all of the times hereinafter men-

tioned has been a citizen and resident of the State of Missouri.

II.

That your orator, Union Trust Company, is now and at all of the times hereinafter mentioned has been a corporation, organized and subsisting under the laws of the State of Michigan, and empowered by its charter to administer trusts and to perform all of the offices, duties and functions assumed by [4] it as hereinafter averred. That your orator is now and at all of the times hereinafter mentioned has been a citizen and resident of the State of Michigan.

III.

That the defendant, Washington Northern Railroad Company, is now and at all of the times hereinafter mentioned has been a corporation, organized under the laws of the State of Oregon, and empowered by its charter to operate a railroad as a private carrier within the State of Washington. That the said defendant is now and at all of the times hereinafter mentioned has been a citizen and resident of the State of Oregon. That prior to the 4th day of June, 1910, the said defendant duly filed with the Secretary of State of Washington a certified copy of its Articles of Incorporation, named a state agent for the State of Washington, paid the license fees exacted by the statutes of Washington from foreign corporations, and has at all times since said date been qualified for the transaction of business within the State of Washington by continued compliance with the said laws.

IV.

That the defendant, Oregon-Washington Timber

Company, is now and at all of the times hereinafter mentioned has been a corporation, organized and subsisting under the laws of the State of Oregon, and empowered under its charter to own timber and timber lands and to manufacture timber products within the State of Washington. That prior to June 4th, 1910, the said defendant had filed with the Secretary of State of Washington a certified copy of its Articles of Incorporation, had appointed a state agent for the State of Washington, had paid the license fees exacted by the statutes of the State of Washington from foreign corporations, and has at all times since said date by compliance with the said statutes continued to be [5] authorized and empowered to transact business within the State of Washington. That the said defendant, Oregon-Washington Timber Company, is now and at all of the times hereinafter mentioned has been a citizen and resident of the State of Oregon.

V.

That the defendant, William W. Crawford, trustee, is now and at all of the times hereinafter mentioned has been a citizen and resident of the State of Illinois, residing in the city of Chicago, therein.

VI.

That the defendant, Blazier Timber Company, is now and at all of the times hereinafter mentioned has been a corporation, organized and subsisting under the laws of the State of Oregon, and a citizen and resident thereof.

VII.

That this is a suit between *d*itizens and residents

of different states in which the amount in controversy exceeds Three Thousand Dollars ($3,000) exclusive of interest and costs; that it is also a suit for the foreclosure of certain liens on property situate within the Western District of Washington and within the Southern Division thereof, which property consists in part of real property, in part of personal property and in part of easements, servitudes and right of way on real property, all situate within the said district.

VIII.

That on the 4th day of June, 1910, pursuant to authority given by unanimous vote of all of its stockholders at a stockholders' meeing theretofore regularly held, and pursuant likewise to a resolution duly adopted by its board of directors at a meeting regularly held prior to the said date the Washington Northern Railroad Company made, executed and [6] delivered to your orator, the Mississippi Valley Trust Company, as trustee, a certain mortgage and deed of trust wherein and whereby the said Washington Northern Railroad Company conveyed to your orator, the Mississippi Valley Trust Company, the following described property, situate in the county of Skamania and within the Southern Division of the Western District of Washington, to wit:

> That certain logging railroad extending from Prindle's Landing in Section Twelve (12), Township One (1) North, Range Five (5) East of the Willamette Meridian, and running thence through and over Sections Twelve (12), One (1), Two (2), Eleven (11), Three (3) and Two (2) in said Township One (1) North, Range

Five (5) East, and thence through and over Sections Thirty-five (35), Twenty-six (26) and Twenty-five (25) in Township Two (2) North, Range Five (5) East of said Meridian, and thence through and over Sections Thirty (30) and Nineteen (19) in Township Two (2) North, Range Six East of said Meridian, and thence through and over Sections Twenty-four (24) and Thirteen (13) in Township Two (2) North, Range Five (5) East of said Meridian, together with all spurs, switches, branches and extensions thereof, being the same railroad heretofore owned by the Cape Horn Railroad Company.

In and by the said mortgage there was also conveyed and transferred to the Mississippi Valley Trust Company, as trustee, in like manner all of the franchises, contracts, rights of way, easements, privileges, traffic agreements, rolling stock, cars and engines which were then owned by the Washington Northern Railroad Company, or which should be thereafter acquired by it, and also all rents, incomes, tolls and profits accruing or to accrue from the business of the Washington Northern Railroad Company, and particularly from the operation of the said property. There was also transferred and conveyed by the defendant, Washington Northern Railroad Company, to Mississippi Valley Trust Company, in and by the said mortgage, all future acquired property, whether the same was real, personal or mixed, and it was specifically provided in and by the said instrument of mortgage that the said future acquired property should be deemed to be a part of the security trans-

ferred by the said mortgage and [7] deed of trust, and as fully embraced within the provisions thereof and subject to the lien created thereby as if the said future acquired property had been owned by the Washington Northern Railroad Company on the 4th of June, 1910, and had been specifically described and mentioned in the said mortgage and deed of trust.

That at the date of the execution of the said mortgage and deed of trust the Washington Northern Railroad Company was engaged in the operation of the railroad property described above, and has continued in the operation thereof at all of the times up to and bringing of this suit when its operation was determined by the appointment of a receiver under the original bill of complaint filed in this cause.

That subsequent to the 4th day of June, 1910, the Washington Northern Railroad Company has acquired additional rights of way, additional railroad lines have been constructed and extensions of the said railroad have been made, and *brances* thereof have been built and put in operation, and are now owned by Washington Northern Railroad Company; that cars and equipment have likewise been acquired and the said railroad now extends northerly, northeasterly and northwesterly from the original northern teminus of said railroad as above described.

That said mortgage was regularly executed and acknowledged, and being entitled to record was duly recorded on the 10th of June, 1910, in the office of the county auditor of Skamania County, Washington, in book "I" at page 339 thereof of the Mortgage Records of Skamania County, Washington. The said

mortgage is hereby by reference incorporated in this amended bill, and your orators pray leave at any and all times to present the said mortgage or a true copy thereof for consideration by the Court in further elaboration of your orator's cause of suit thereunder. [8]

IX.

That the said mortgage described in paragraph VIII of this amended bill was executed by way of security for a bond issue in the aggregate sum of One Million Dollars ($1,000,000) and as contemplated in and by the said mortgage there were duly issued one thousand negotiable bonds, each of the denomination of One Thousand Dollars ($1,000) and numbered one to one thousand consecutively, which bonds were substantially in the following form except that the said bonds were numbered as aforesaid, and were duly signed by the president and secretary of the Washington Northern Railroad Company and by the vice-president of Mississippi Valley Trust Company, to wit:

$1,000. No. ——. $1,000.

UNITED STATES OF AMERICA.

State of Oregon.

WASHINGTON NORTHERN RAILROAD COMPANY.

First Mortgage, Six Per Cent. Gold Bond.

The Washington Northern Railroad Company, a corporation under the laws of the State of Oregon, acknowledged itself to owe and hereby promises to pay to the bearer, or, if this bond be registered as hereinafter provided, then to the registered owner

hereof, for value received, One Thousand Dollars, at the office of the Mississippi Valley Trust Company, in the City of St. Louis, State of Missouri, on the first day of May, 1928, without grace, and also promises to pay interest thereon at the rate of six per centum per annum from May 1st, 1910, payable semi-annually on the first days of May and November in each year, said interest until the maturity of this bond being evidenced by and to be paid on presentation and surrender of the respective interest coupons hereto annexed, as they severally mature, at said office of the Mississippi Valley Trust Company; the principal and interest of this bond to be paid without grace in Gold Coin of the present standard of weight and fineness as fixed by the laws of the United States now in force, without deduction of any tax or taxes which the Railroad Company may be required to pay thereon, whether now imposed or hereafter to be imposed thereon, either by the laws of the United States, or by any state, county or municipality therein, this Company agreeing to pay the same.

This bond is one of a series of bonds for the aggregate amount of One Million Dollars ($1,000,000), all of like tenor, amount, date and maturity, and numbered from 1 to 1,000 both inclusive, all executed and delivered in pursuance of the votes of the stockholders and Board of Directors respectively of said Washington Northern Railroad Company, authorizing the issue of said Bonds and the execution and delivery of the deed of trust hereinafter mentioned. [9]

The payment of the principal and interest of all

said bonds is equally secured by first mortgage deed of trust of even date, executed and delivered by said Railroad Company conveying all and singular the property in said first mortgage deed of trust fully described, said first mortgage deed of trust being referred to and the terms thereof made part of this bond.

This bond shall pass by delivery, unless it has been registered as to payment of the principal, as provided in the form for registration on the back hereof.

No recourse shall be had for the payment of any part of the principal or interest of this bond against any incorporator, or any present or future stockholder, officer or directors of said Washington Northern Railroad Company, either directly or through said Company, by virtue of any statute or by the enforcement of any assessment or otherwise; any and all liability of said incorporations stockholders, directors and officers being by the acceptance hereof and as a part of the consideration for the issuance hereof, expressly released.

This bond may be called and redeemed by the Railroad Company, or by the Trustee, on November 1, 1910, or on any interest payment date thereafter on payment of the principal hereof and accrued interest to the date fixed for payment, together with a premium of three (3) per cent on said principal upon sixty days' notice, given as provided by the terms of said mortgage deed of trust. In making such calls for redemption these bonds which have the lowest numbers, beginning with number one,

shall be called first, in the order of their numbers.

This bond shall not be valid for any purpose until it shall have been authenticated by the certificate endorsed herein, duly signed by said Mississippi Valley Trust Company, as trustee.

IN WITNESS WHEREOF, said Washington Northern Railroad Company has caused its corporate name to be signed hereto by its President or a Vice-president, and its corporate seal to be hereto affixed, attested by its Secretary or Assistant Secretary and has caused the coupons hereto attached to be executed with the facsimile signature of its present Treasurer, all as of the 4th day of June, A. D. 1910.

WASHINGTON NORTHERN RAILROAD COMPANY,

By ————————,

President.

Attest: ————————,

Secretary.

TRUSTEE'S CERTIFICATE.

This certifies that the within bond is one of the series of bonds described in the within mentioned first mortgage deed of trust.

MISSISSIPPE VALLEY TRUST COMPANY, Trustee.

By ————————,

Vice-president.

That attached to each of the said bonds was a coupon which entitled the bearer to the payment of Thirty Dollars ($30.00) and interest on the 1st day of May and on the 1st [10] day of November of

each year subsequent to the date of the said mortgage, it being agreed in and by the terms of the said mortgage that the said debt secured thereby should bear six per cent (6%) interest payable semi-annually on the 1st day of May and the 1st day of November of each year, the principal of the said debt, however, being payable on the 1st day of May, 1928, subject to provisions hereinafter referred to with reference to a prior maturity of the same.

X.

That in and by the terms of the said mortgage the Washington Northern Railroad Company covenanted and agreed to pay the bonds so issued thereunder and the interest installments thereon as the same matured from time to time, and also covenanted and agreed to pay all taxes and assessments of all kinds and descriptions which might be assessed, levied or charged against any part of the said security, and the Washington Northern Railroad Company also covenanted and agreed to pay any mechanic's or other liens on any of the said property which might have priority over the said mortgage, and warranted that the said mortgage during the life of the said loan should at all times remain a first lien against all of the said property. It is further provided in and by the terms of the said mortgage and deed of trust that in case the trustee, pursuant to an option therein contained, shoud advance or expend any money for premiums for insurance on any of the property covered thereby, or for any taxes or assessments or for the redemption of the said property from any tax sales or for the payment of any liens which might take precedence over

the lien of the said mortgage that all advances so made by the trustee, together with a reasonable sum for its services in protecting the said property in the said respects, should be paid by the Washington Northern Railroad Company to be, and should be deemed to be a part of the [11] debt secured by the said mortgage and deed of trust. It was further provided therein that the Washington Northern Railroad Company would pay any taxes or public dues levied by any lawful authority on the said mortgage debt, or the interest thereon, to the end that the holders of the said bonds might receive the amounts stipulated therein without deduction for or on account of any taxes or public dues levied thereon or required to be retained therefrom. It was further provided in the said mortgage that if default should be made by the Washington Northern Railroad Company in the payment of any sum of money called for by the said bonds, or any thereof, whether the same was principal or interest, or in the performance of any other covenant assumed by the Washington Northern Railroad Company in and by said mortgage, and in case said default should continue for thirty days after written notice given by the trustee to the Washington Northern Railroad Company, or by the holder of any bonds secured thereby, which notice by a bondholder might be left with the said trustee, Mississippi Valley Trust Company, then and in either of said cases the said Mississippi Valley Trust Company might at its option declare the entire principal of the said bonds then outstanding at once due and

payable, together with all the accrued and unpaid interest thereon, and the said debt, both principal and interest, should at once become payable by Washington Northern Railroad Company, and thereupon the Mississippi Valley Trust Company should be empowered to proceed in any court having jurisdiction for the foreclosure of the said mortgage and the sale of the said property under foreclosure decree. That it was further provided therein that out of the proceeds of any foreclosure sale there should be paid all of the costs incurred by the Mississippi Valley Trust Company in the foreclosure suit, a reasonable solicitor's fee therein, and all of the expenses and charges of the trust devolving [12] upon the Mississippi Valley Trust Company under the said mortgage and deed of trust, and also a reasonable compensation to the trustee for its services in the performance thereof and in the conduct of the foreclosure suit, and it was further provided therein that the trustee should be reimbursed for any and all moneys advanced by it in the performance of its trust, or in the care of properties pledged to it under the said mortgage and deed of trust. That it was further provided therein that upon any foreclosure sale being made by the mortgaged premises the principal of all bonds secured thereby and then outstanding should at once become due and payable, anything in the said bonds or the said mortgage to the contrary notwithstanding. That it was further provided in and by the said mortgage that pending the foreclosure of the same the Mississippi Valley Trust Company, as trustee

aforesaid, might at its option take possession of the said properties and operate the same or might apply to the Court for the appointment of a receiver, and the Washington Northern Railroad Company in and by the said mortgage and deed of trust consented to the appointment of such receiver and to his custody of the property hereinbefore described and covered by the said mortgage, and to the application on the expenses of trustee, and the debt secured by the said mortgage and deed of trust of any moneys and the proceeds of any assets in the possession of the receiver; and it was further provided in and by the said mortgage and deed of trust that it should be competent for such receiver to operate the railway property hereinbefore specified and to carry on any of the operations of the Washington Northern Railroad Company, and the Washington Northern Railroad Company in and by the said mortgage and deed of trust consented thereto.

XI.

That the interest called for by the bonds hereinbefore described up to and including the 1st day of May, 1912, **[13]** has been paid, but default was made by the Washington Northern Railroad Company in an installment of interest thereon maturing on the 1st day of November, 1912, and similar default was made in the payment of installment of interest maturing on the 1st day of May, 1913, and since the pendency of this suit, and on the 1st day of November, 1913, a further default has been made in the payment of interest on the said bonds. That the said interest has been demanded by the Missis-

sippi Valley Trust Company and by the bondholders entitled thereto, but the Washington Northern Railroad Company has failed and neglected to pay the same and the whole thereof.

That the Washington Northern Railroad Company has likewise neglected to pay large amounts of money due and regularly assessed and levied against the properties above described, as taxes for the *year* 1912 and 1913; that unless the said taxes be paid levies will be made on the said mortgaged property and the same will be sold for the satisfaction of the same. That by reason of the defaults aforesaid your orator, the Mississippi Valley Trust Company, has elected to declare the entire debt due and owing, and on or about the 3d day of September, 1913, your orator served notice on Washington Northern Railroad Company in writing, and pursuant to the provisions of the mortgage hereinbefore referred to, of its demand for the payment of the interest delinquent as aforesaid, and of its election to declare the entire debt due and owing unless the moneys due and unpaid were paid within thirty days from the date of such notice. That the said thirty days has long since expired and no part of the said money has been paid.

XII.

That it was furthermore provided in and by the said mortgage and deed of trust that the security might be sold [14] either as an entirety or in parcels; that the said property cannot be sold to advantage except as an entirety; that it would be impracticable to operate the same except under one

ownership, and that an attempt to sell the said properties piecemeal or in parcels would result in the sacrifice thereof; and that it is necessary for the conservation of the said property and the protection of the liens thereon that the said property be sold as an entirety.

XIII.

That the Washington Northern Railroad Company had defaulted in the payment of divers and sundry of its obligations prior to the bringing of this suit; that it was threatened with attachments and levies upon its property, and that it was then and is now unable to operate its property and to carry out its contracts, or to conserve its property and protect the same for the benefit of its lien holders. That the said defendant was at the institution of this suit and still is wholly unable to pay the taxes and lawful assessments levied and to be levied on its property. That it was necessary at the institution of this suit and is still necessary that a receiver take possession of the said properties and hold the same during the pendency of this suit to the end that the same shall be conserved and protected from seizure under divers and sundry claims and liens, and to the end that the said property may be disposed of in accordance with law and with the contract rights of the parties to this suit.

XIV.

That on the 4th day of June, 1910, pursuant to authority given by a unanimous vote of its stockholders at a meeting of the stockholders duly called for such purpose, and pursuant to a resolution duly

passed at a regularly called [15] meeting of the board of directors, Oregon-Washington Timber Company made, executed and delivered to your orator, Mississippi Valley Trust Company, its certain mortgage and deed of trust, wherein and whereby it conveyed to the Mississippi Valley Trust Company, as trustee, in fee simple *title all* of the following described property and timber situate thereon, all situate in the County of Skamania and State of Washington, to wit:

The East Half (E.½) of the Northeast Quarter (NE.¼) of Section Twenty-five (25); the North Half (N.½) of the North Half (N.½) of Section Twenty-four (24); the East Half (E.½) of the Northeast Quarter (NE.¼) and the North Half (N.½) of the Southeast Quarter (SE.¼) of Section Twenty-three (23); the East Half (E.½) and the East Half (E.½) of the West Half (W.½) and the Southwest Quarter (SW. ¼) of the Northwest Quarter (NW.¼), and the Northwest Quarter (NW.¼) of the Southwest Quarter (SW.¼) of Section Fourteen (14); the whole of Section Thirteen (13); the East Half (E.½) of Section Eleven; the Southeast Quarter (SE.¼), and the Southwest Quarter (SW.¼) of the Northeast Quarter (NE.¼), and the Northeast Quarter (NE.¼) of the Northwest Quarter (NW.¼), and the West Half (W.½) of the Northwest Quarter (NW.¼), and the Northwest Quarter (NW.¼) of the Southwest Quarter (SW.¼) and the South Half (S.½) of the Southwest

Quarter (SW.¼) of Section Twelve (12); the Southeast Quarter (SE.¼) of Section Two (2); the whole of Section One (1); all in Township Two (2) North, Range Five (5) East, Willamette Meridian.

The Northwest Quarter (NW.¼) of Section Thirty (30); the Southwest Quarter (SW.¼), and the North Half (N.½) of the North Half (N.½) of Section Nineteen (19); the whole of Section Eighteen (18); the Southeast Quarter (SE.¼) of the Southeast Quarter (SE.¼), and the Southwest Quartetr (SW.¼) of the Northwest Quarter (NW.¼) of Section Seven (7); the Northwest Quartetr (NW.¼) of Section Eight (8); the Southwest Quarter (SW.¼) of the Southeast Quarter (SE.¼), and the Southwest Quarter (SW.¼), and the Southeast Quarter (SE.¼) of the Northwest Quarter (NW.¼) and the West Half (W.½) of the Northwest Quarter (NW.¼) of Section Six (6); all in Township Two (2) North, Range Six (6) East, Willamette Meridian.

The North Half (N.½) of the Northeast Quarter (NE.¼), the South Half (S.½) of the Southeast Quarter (SE.¼) of Section Thirty-four (34); the whole of Section Thirty-five (35); the South Half (S.½), and the Northeast Quarter (NE.¼) of Section Thirty-six (36); the South Half (S.½) of Section Twenty-five (25); the Southwest Quarter (SW.¼) and the Southwest Quarter (SW.¼) of the Southeast Quarter (SE.¼), and the Southwest Quarter (SW.¼)

of the Northwest Quarter (NW.¼) of Section Twenty-six (26), the Northwest Quarter (NW.¼) of Section Twenty-four (24); the Southwest Quarter (SW.¼) of the Southeast Quarter (SE.¼) of Section Thirteen (13); all in Township Three (3) North, Range Five (5) East Willamette Meridian. **[16]**

The whole of Section Thirty-one (31); the whole of Section Thirty-two (32); the whole of Section Twenty-eight (28); the Northwest Quarter (NW.¼) of Section Twenty-nine (29); the Southwest Quarter (SW.¼) of Section Thirty (30); the Southwest Quarter (SW.¼) of Section Twenty (20); the Southeast Quarter (SE.¼) and the West Half (W.½) of Section Nineteen (19); the whole of Section Eighteen (18); the Southwest Quarter (SW.¼) of Section Seventeen (17); the Southwest Quarter (SW.¼) of Section Eight (8); all in Township Three (3) North, Range Six (6) East, Willamette Meridian.

Containing in all about ten thousand eight hundred (10,800) acres, with timber situate thereon aggregating approximately four hundred million (400,000,000) feet.

In and by the said mortgage and deed of trust the defendant, Oregon-Washington Timber Company, likewise assigned and transferred to your orator, Mississippi Valley Trust Company, all real property, lands, timber and timber rights, and rolling stock of every kind and description then owned by Oregon-Washington Timber Company, or thereafter

to be acquired by it wheresoever the same was or might be situate, and also all tenements, hereditaments, buildings, structures, warehouses, workshops, mills, plants and fixtures, and all machinery, engines and boilers, and all documents, deeds, timber contracts and leases, maps, surveys, inventories and papers relating to the real estate and timber rights and contracts conveyed and pledged therein, whether the same were then owned by Oregon-Washington Timber Company or might be thereafter acquired; and also all rents, issues and profits, earnings, and income from the said property so specified, including likewise all property of the above kinds and descriptions which the said Oregon-Washington Timber Company owned on the 4th day of June, 1910, and all property of the said kind, nature and description which it might thereafter acquire in any manner and wheresoever the same might be situate. That the said mortgage was duly executed and acknowledged, was duly delivered to the Mississippi Valley Trust Company, and was duly recorded in the office of the county auditor of Skamania County, Washington, in book "I" at page 296 thereof of the Records of Mortgages **[17]** for Skamania County, Washington, on or about the 10th day of June, 1910. That the said mortgage thereupon became and has at all times since remained a first lien and encumbrance on the said property and the whole thereof.

XV.

That the said mortgage given by Oregon-Washington Timber Company to Mississippi Valley Trust

Company was given for the security of bonds in the aggregate sum of Six Hundred Thousand Dollars ($600,000), being six hundred bonds in number each for the sum of One Thousand Dollars ($1,000) which were negotiable and under which the amounts secured thereby were payable to bearer. That the said bonds by their terms bore interest at the rate of six per cent (6%) per annum, and the interest thereon was payable at intervals of six months on the 1st day of May and the 1st day of November in each year. That by the terms of said bonds the debt evidenced thereby, both principal and interest, was payable without deduction of any tax levied thereon by the United States or by any governmental authority. That by the terms of the said bonds Thirty Thousand Dollars ($30,000) of the said debt, evidenced by bonds one to thirty, became due and payable on the 1st of May, 1912, and that a like sum became due at intervals of six months thereafter, each installment of the said debt so maturing being evidenced by thirty bonds numbered consecutively, each for the sum of One Thousand Dollars ($1,000). That each of the said bonds had attached to it coupons evidencing the interest payments which were to be made on the 1st day of May and the 1st day of November of each year prior to the maturity of the said bonds and which were negotiable in form and payable to bearer. **[18]**

XVI.

That upon the execution of the mortgage given by Washington Northern Railroad Company to your orator, the Mississippi Valley Trust Company,

hereinbefore described, the defendant, Oregon-Washington Timber Company, purchased from Washington Northern Railroad Company for a valuable consideration, and became the owner of the entire issue of bonds secured by the said mortgage given by Washington Northern Railroad Company to your orator, the Mississippi Valley Trust Company, and thereupon bonds of the said issue to the amount of Six Hundred Thousand Dollars ($600-,000) and numbered respectively one (1) to six hundred (600) inclusive, were sold, assigned and transferred to your orator, Mississippi Valley Trust Company in and by the mortgage described *in and by the mortgage described* in paragraph XIV of this your orator's amended bill, and as a part of the security for the debt described and set forth in paragraph XV of this your orator's amended bill, and that it was provided in the said mortgage given by Oregon-Washington Timber Company to your orator, Mississippi Valley Trust Company that when the bonds secured thereby should be paid and canceled by the trustee a like amount par value of the bonds of Washington Northern Railroad Company so conveyed and transferred as a part of the said security should be also canceled by the trustee and returned to the Washington Northern Railroad Company, or delivered to the said Washington Northern Railroad Company uncanceled at its option.

XVII.

That by the terms of the said mortgage so given by the defendant, Oregon-Washington Timber Com-

pany, to your orator, Mississippi Valley Trust Company, it was further provided that the said mortgagor, the Oregon-Washington Timber Company would annually pay into the hands of the trustee a sum of money not less than Forty-five Thousand Dollars ($45,000) [19] to be derived from the logging of timber situate on the property described in the said mortgage, the first year for which such payment was to be made being the year intervening between May 1st, 1911, and May 1st, 1912. That the total amount which should have been paid under the terms of the said provisions of the said mortgage, and which should have created a sinking fund for the retirement of the said bonds of the Oregon-Washington Timber Company, is the sum of Ninety Thousand Dollars ($90,000).

XVIII.

That it was further provided in and by the said mortgage given by the defendant, Oregon-Washington Timber Company, to Mississippi Valley Trust Company, that Mississippi Valley Trust Company, the trustee named therein, might appoint a co-trustee by designating such appointment in writing and filing the same with the Secretary of Oregon-Washington Timber Company, and that when such appointment should be so made the trustee so named should be vested jointly with the Mississippi Valley Trust Company with all title to the said assets and with all powers, duties and franchises described in the said mortgage or deed of trust executed on the 4th day of June, 1910, by Oregon-Washington Timber Company to Mississippi Valley Trust Company.

That thereafter, and on or about the 19th day of May, 1911, by an appropriate instrument in writing, your orator, Mississippi Valley Trust Company, did designate your orator Union Trust Company, a co-trustee under the said mortgage and deed of trust as given by Oregon-Washington Timber Company. That the said instrument was duly filed with the Secretary of Oregon-Washington Timber Company, and duly placed on record in the Records of Deeds of Skamania County, Washington, in book "N" at page 178 thereof, on the 31st day of May, 1911. That at all of the times subsequent to the said 19th day of May, 1911, the [20] powers, duties, titles and franchises created by the said mortgage of June 4th, 1910, given by Oregon-Washington Timber Company, have been held and exercised jointly by your orators, Mississippi Valley Trust Company, of St. Louis, Missouri, and Union Trust Company of Detroit, Michigan.

XIX.

That it was provided in and by the terms of the said mortgage given by Oregon-Washington Timber Company on the 4th of June, 1910, that the mortgagor therein would pay all taxes and lawful assessments which might be assessed or levied against any of the property covered by the said mortgage, and that a failure to pay the same should be deemed to be a default under the terms of the said instrument.

XX.

That the defendant, Oregon-Washington Timber Company, has defaulted in the payment of taxes on the properties covered by the said mortgage of June

4th, 1910, for the years 1911, 1912 and 1913; that no part of the said taxes have been paid; that unless the same shall be paid the properties will be advertised and sold for the payment of the same, and the said properties will be lost not only to the defendant, Oregon-Washington Timber Company but to the other parties to this suit and to the bond holders who have purchased and now hold the bonds of the Oregon-Washington Timber Company secured by the said mortgage. That default was made likewise by the said defendant, Oregon-Washington Timber Company in the sinking fund provisions of the said mortgage, and the said defendant has wholly failed *the* neglected to pay to your orators, for the creation of a sinking fund, the sum of Forty-five Thousand Dollars ($45,000) agreed to be paid for the year ending May st, 1912, and has wholly failed to pay the su mof [21] Forty-five Thousand Dollars ($45,000) agreed to be paid for the year ending May 1st, 1913. That the interest due on the principal of the said debt on the 1st of November, 1912, remains at this time wholly unpaid, as does the interest due on the 1st of May, 1913, and the 1st of November, 1913. That it was provided in and by the terms of the said mortgage and deed of trust so given by Oregon-Washington Timber Company that in case a default should be made in any of the respects hereinbefore indicated, and in case a demand should be made upon the said defendant, Oregon-Washington Timber Company, by the trustee or trustees under the said mortgage, for the payment of the said sum of money, that at the expiration of sixty days from the making

of said demand the entire sum secured by the said mortgage should at once become due and payable, and that your orators should be vested with the right to proceed in equity for the foreclosure of the said mortgage, and the enforcement of the security so given for the said bonds. That on the 2d day of September, 1913, demand was duly made in writing on the defendant, Oregon-Washington Timber Company, for the payment of the several sums of money as to which it had defaulted prior to the said date, but no payment has been made pursuant thereto and the sixty days prescribed in and by the said mortgage have long since expired. That your orators have elected to declare the entire debt due and owing and to enforce their security thereon.

XXI.

That the entire bond issue secured by the said mortgage so executed by Oregon-Washington Timber Company, amounting to Six Hundred Thousand Dollars ($600,000), has been negotiated and sold and is now outstanding except that Thirty Thousand Dollars, ($30,000) of bonds, maturing on the 1st day of [22] May, 1912, and being respectively bonds numbered one (1), for the sum of One Thousand Dollars ($1,000) have been paid, canceled and discharged. That thereupon there were delivered by your orators to the defendant, Washington Northern Railroad Company, bonds in the sum of Thirty Thousand Dollars ($30,000) which bonds the said Washington Northern Railroad Company elected to have delivered to it uncanceled. That there is now outstanding, secured by the lien of the said mortgage given

by Oregon-Washington Timber Company, bonds to the amount of Five Hundred and Seventy Thousand Dollars ($570,000) together with interest thereon at the rate of six per cent (6%) per annum from May 1st, 1912.

XXII.

That it was provided in and by the terms of the said mortgage and deed of trust given by Oregon-Washington Timber Company that in the event of default as aforesaid it should be competent for your orators to take possession of the said property, either as trustees under the terms of the said instrument or through a receiver to be appointed by a court of competent jurisdiction, to the end that the said properties might be conserved and protected from loss and damage and depreciation at the hands of the creditors of Oregon-Washington Timber Company. That at the time of bringing this suit Oregon-Washington Timber Company was insolvent and wholly unable to pay its debts, and wholly unable to pay the taxes assessed and levied and to be in the future assessed and levied against the said properties. That it was necessary then and is necessary now for the protection of the said properties, and of the security so pledged therein, that a receiver be appointed, and that the said property pending this foreclosure be in the custody of this court through a receiver thereof. [23]

XXIII.

That it was further provided in and by the said mortgage that the trustee should be reimbursed for all proper outlays made by it in the handling of its

trust, and in the performance of its duties, and that in the event of a foreclosure of the said mortgage there should be chargeable against the mortgagor a reasonable attorney's fee and a reasonable compensation to the trustee for the conduct of the foreclosure suit, and for all services performed by the trustee or trustees and their attorneys therein, and that all of the costs and expenses of the said suit should be likewise chargeable against the security so pledged by its mortgage and deed of trust hereinbefore described.

XXIV.

Your orators aver that the defendant, Oregon-Washington Timber Company, the defendant Washington Northern Railroad Company and the defendant Blazier Timber Company are controlled and dominated by the same set of officers; that the stock in each of the said corporations is held by practically the same stockholders, and each of the said corporations is controlled by J. E. Blazier and E. J. Blazier, and that while three separate corporate organizations are maintained for the said companies there is in reality an intimate business association between the said corporations, and particularly between Oregon-Washington Timber Company and Washington Northern Railroad Company. That the business of Oregon-Washington Timber Company is wholly dependent upon the operation of the railroad of Washington Northern Railroad Company, and the operations of the railroad of Washington Northern Railroad Company are almost wholly dependent upon the marketing of timber on the lands of

Oregon-Washington Timber Company. That the revenues of the [24] said Washington Northern Railroad Company are derived from the carriage of timber products for Oregon-Washington Timber Company chiefly if not exclusively. That said Oregon-Washington Timber Company is a private carrier and not a common carrier. That the timber lands of Oregon-Washington Timber Company hereinbefore described contain a large quantity of timber, but the said timber is not green timber, but has been burned over and will deteriorate in value if not marketed within a reasonable time. That the said timber lands and the timber situate thereon are depreciating in value from time to time by reason of the said fire which has burned thereover.

XXV.

That subsequent to the making of the mortgage by Washington Northern Railroad Company on the 4th of June, 1910, the said Washington Northern Railroad Company entered into a contract with Weist Logging Company for the purchase from Weist Logging Company of a certain logging outfit with property appurtenant thereto, which is fully described in a certain instrument of record in book 2 at page 155 thereof of the Records of Agreements of the County of Skamania, and State of Washington, and in the office of the county auditor thereof. That it was agreed between Washington Northern Railroad Company and Weist Logging Company that Eighty Thousand Dollars ($80,000) should be paid for the said logging equipment, and that the title thereto should remain with Weist Logging Company until

the whole of the said sum had been paid. That Thirty Thousand Dollars ($30,000) was paid thereon by Washington Northern Railroad Company, and thereupon the rights of Washington Northern Railroad Company under the said contract of sale were assigned and transferred to the defendant, Blazier Timber Company, and the defendant, Blazier Timber Company, now claims some rights therein, but the assignment so taken by Blazier Timber Company was taken [25] with full notice of the mortgage given by Washington Northern Railroad Company, and of the provisions therein pledging as part of the security all after acquired property of Washington Northern Railroad Company, whether the same was real, personal or mixed.

XXVI.

That your orators by reference hereby incorporate in this their Bill the mortgage given by Oregon-Washington Timber Company to Mississippi Valley Trust Company on the 4th day of June, 1910, and crave leave to produce same, or a true copy thereof, as evidence of the rights of your orators thereunder.

XXVII.

That on or about the 1st day of March, 1912, the defendants, Washington Northern Railroad Company, Oregon-Washington Timber Company and Blazier Timber Company, made, executed and delivered to the defendant, William W. Crawford, trustee, a certain mortgage and deed of trust covering substantially all of the property hereinbefore described, and covering certain other property owned by the Blazier Timber Company as well. That the

said mortgage was by its terms a second mortgage on the said security hereinbefore described, and recited the execution of the mortgages held by your orators, and was and is subject and subordinate to the rights created by the mortgages so executed on the 4th day of June, 1910, by Washington Northern Railroad Company and by Oregon-Washington Timber Company. That under said mortgage the said defendant, William W. Crawford, claims some right in or lien upon the said property.

XXVIII.

That on the 4th of June, 1910, the defendant, Oregon-Washington Timber Company, executed a second mortgage on the properties described in paragraph XIV of this amended bill for [26] the security of Four Hundred Thousand Dollars ($400,000) of second mortgage bonds. That the said bond issue in its entirety was sold, assigned and transferred by the defendant, Oregon-Washington Timber Company, to the defendant, Washington Northern Railroad Company, and as collateral security for the said bond issue of the Oregon-Washington Timber Company the said Oregon-Washington Timber Company assigned, transferred and set over also to Washington Northern Railroad Company Four Hundred Thousand Dollars ($400,000) in amount of the bonds of Washington Northern Railroad Company, secured by the mortgage described in paragraph VIII of this amended bill, being bonds six hundred and one (601) to one thousand (1,000). That your orator, Mississippi Valley Trust Company, was and is trustee under the terms of the said second mortgage

so created, and the said bonds of Washington Northern Railroad Company were lodged with your orator, Mississippi Valley Trust Company, and are still held by it, pursuant to the transfer so made. That it is provided in and by the said second mortgage so executed by Oregon-Washington Timber Company that as and when the bonds secured thereby should be paid bonds of the Washington Northern Railroad Company in equivalent amount should be surrendered to Washington Northern Railroad Company, either canceled or uncanceled as Washington Northern Railroad Company might elect. That in and by the mortgage given to the defendant, William W. Crawford, trustee, the Washington Northern Railroad Company sold and assigned the said Four Hundred Thousand Dollars ($400,000) of second mortgage bonds of the Oregon-Washington Timber Company and the said One Million Dollars ($1,000,000) of first mortgage bonds of Washington Northern Railroad Company secured by the mortgage described in paragraph VIII of this amended bill, as the said first mortgage bonds of the said Washington Northern Railroad Company should be from time *to* [27] *released* and delivered, or releasable and deliverable by your orator, Mississippi Valley Trust Company, under the terms and provisions of the said first and second mortgage deeds of trust respectively of the Oregon-Washington Timber Company. That it was provided in and by the agreement between Washington Northern Railroad Company and Oregon-Washington Timber Company that the second mortgage bonds of Oregon-Washington

Timber Company with the collateral therefor, to wit, bonds six hundred and one (601) to one thousand (1,000) of the first mortgage bond issue of Washington Northern Railroad Company, should be sold and the proceeds thereof should be applied to the construction of additional railway lines for the Washington Northern Railroad Company into timber owned by Oregon-Washington Timber Company, and for the making of betterments and the purchase of equipment for said railroad. That your orators are advised that the said bond issue was not used for these purposes, but that the said bonds were undertaken to be pledged by the defendants, Oregon-Washington Timber Company and Washington Northern Railroad Company to the defendant, William W. Crawford, trustee, as hereinbe*of*re set forth. Your orators are also advised and charge the fact to be that the said William W. Crawford, trustee, acquired all of his rights in and to the said bonds and in and to the security hereinbefore specified with full notice of all of the facts set forth in this your orators' bill. Your orators are further advised that a dispute exists between the holders of the first mortgage bonds of the Oregon-Washington Timber Company and of the Five Hundred and Seventy Thousand Dollars ($570,000) of bonds of the Washington Northern Railroad Company on the one hand, and the said William W. Crawford, trustee, on the other hand, as to whether the railroad bonds numbered from six hundred and one (601) to one thousand (1,000) inclusive are entitled to participate with the said Five Hundred [28] and Seventy Thousand Dollars

($570,000) of Washington Northern Railroad bonds in the sale of the said property, and your orators are also advised that the bonds of the Washington Northern Railroad Company surrendered to it on the 1st of May, 1912, being Thirty Thousand Dollars ($30,000) in amount, are also claimed by the defendant, William W. Crawford, and that he claims the right to enforce the same as of equal dignity with the bonds in the sum of Five Hundred and Seventy Thousand Dollars ($570,000) so held as part of the security for the first mortgage given by Oregon-Washington Timber Company. That it is necessary for the protection of your orators in the disbursement of the funds arising from any sales which may be made of the properties described in this your orators' amended bill, that your orators shall be fully advised of the rights of the respective parties in and to such funds, and it is necessary for the protection of your orators that this Court by its decree shall determine whether the said bonds of the Washington Northern Railroad Company so claimed by the said William W. Crawford are of equal dignity with the Five Hundred and Seventy Thousand Dollars ($570,000) of bonds aforesaid, or whether the said Four Hundred and Thirty Thousand Dollars ($430,000) of bonds so claimed by William W. Crawford, trustee, are to be deemed to be satisfied or postponed to the Five Hundred and Seventy Thousand Dollars ($570,000) of bonds so held as a part of the security for the first mortgage given by Oregon-Washington Timber Company.

XXIX.

That it was provided in the mortgage given by

Washington Northern Railroad Company, and specified in paragraph VIII of this amended bill, and in the mortgage given by Oregon-Washington Timber Company, and described in paragraph XIV of this amended bill, that at any foreclosure sale of the properties [29] covered by the said mortgages bond holders secured thereby might bid at the said sale and pay their bids in part by the indorsement on their bonds of such credits as the said bonds should be entitled to from the purchase price of the properties sold at such sale or sales.

XXX.

That your orators have no plain, speedy or adequate remedy at law. That all of the facts and circumstances herein set forth are true and entitle your orators to consideration and relief at the hands of a court of equity.

WHEREFORE, your orators bring this their bill and pray that pending this foreclosure the said properties may be held by a receiver of this court, and protected from depreciation and sale for the payment of taxes, and protected likewise from seizure by the general creditors of the several defendants to this suit, and that the properties pledged by Washington Northern Railroad Company as security for its mortgage hereinbefore described may be sold in the manner prescribed by law, and that the properties covered by the mortgage of Oregon-Washington Timber Company in and by its first mortgage described in paragraph XIV of this amended bill may be likewise sold. That the rights of all of the parties to this suit may be determined by the decree, and

that the funds arising from the sale *sale* may be distributed in accordance with the rights and equities of the respective parties, and that such hearings may be had as shall suffice to advise the Court thoroughly with reference to the rights of the respective parties, and of the respective bond holders secured by the said mortgages.

Your orators further pray that in and by the said decree it may be provided that any bond holders secured by [30] the said mortgages may bid at the said sale, and may pay such portions of their bids as their bonds shall be entitled to under the said decree by indorsement of the said amounts on their bonds. That the amounts due under each of the said mortgages may be determined and accurately fixed by the said decree, and that judgment may be rendered against the Washington Northern Railroad Company for the amount of its debt, and against Oregon-Washington Timber Company for the amount of its debt. That your orators may be awarded in and by the said decree a reasonable and suitable sum for their services in administering the said trust and in foreclosing the said mortgages, and that they may likewise be awarded reasonable sums for the services of their attorneys, and that they may be allowed for all disbursements made by them, and for the usual costs of the said suit, and your orators also pray that they may have such other and further relief as shall

be equitable and meet in the premises.

HUFFER & HAYDEN,
Solicitors for Complainants.

SNOW & McCAMANT.

(Verified.)

(Acceptance of Service.)

(Filed Dec. 6, 1913.) [31]

[Title of Court and Cause.]

Answer.

Comes now the defendant William W. Crawford, trustee, and answering the amended bill of complaint on file herein, for cause of answer says:

I.

He admits that the Mississippi Valley Trust Company is a corporation, organized and subsisting under the laws of the State of Missouri, and authorized by its charter to administer trusts and to perform the offices, duties and functions of a trustee, and that it is a citizen and resident of the State of Missouri. That as to whether the Mississippi Valley Trust Company is authorized to administer trusts and to perform the offices, duties and functions averred in the complaint in the State of Washington, this defendant has no knowledge. [32]

II.

Answering the second paragraph of the amended bill of complaint, this defendant admits that the Union Trust Company is a corporation, organized under the laws of the State of Michigan and is a citizen and resident of the State of Michigan; but as to whether said corporation is empowered by its char-

ter to administer trusts and to perform the offices, duties and functions of a trustee, as averred in said amended bill of complaint within the State of Washington, this defendant has no knowledge.

III.

Answering the third paragraph of the amended bill of complaint this defendant admits that the Washington Northern Railroad Company is a corporation, duly organized under the laws of the State of Oregon. That as to whether it is empowered by its charter to operate a railroad as a private carrier within the State of Washington this defendant has no knowledge. He admits that the Oregon-Washington Railroad Company is a citizen and resident of the State of Oregon; as to whether the said railroad company has filed with the Secretary of State of the State of Washington a certified copy of its articles of incorporation, or named a state agent for the State of Washington, or paid the license fees required by the statutes of the State of Washington from foreign corporations, or as to whether said railroad company is qualified for the transaction of business within the State of Washington by a continued compliance with said laws, or at all, this defendant has no knowledge.

IV.

Answering the fourth paragraph of the amended bill of complaint, this defendant admits that the Oregon-Washington Timber Company is a corporation, organized and subsisting under [33] the laws of the State of Oregon, and empowered under its charter to own timber and timber lands and

manufacture timber products within the State of Washington. That as to whether said timber company has filed a certified copy of its articles of incorporation with the Secretary of State of the State of Washington, or named a state agent for the State of Washington, or has paid the license fees required by the statutes of the State of Washington from foreign corporations, or by compliance with said statutes been authorized and empowered to transact business within the State of Washington, this defendant has no knowledge.

V.

This defendant admits that William W. Crawford, trustee, is now, and at all the times hereinafter mentioned has been, a citizen and resident of the State of Illinois, residing in the city of Chicago therein.

VI.

Answering the sixth paragraph of the amended bill of complaint, this defendant admits the same.

VII.

Answering the seventh paragraph of said amended bill of complaint, this defendant admits that this is a suit between citizens and residents of different states, and that the amount in controversy exceeds $3000, exclusive of interest and costs, and admits that it is an action for the foreclosure of certain liens on property situate within the Western District of Washington and within the Southern Division thereof, which property consists in part of real property, in part of personal property and in part of easements, servitudes and rights-of-way on real

property, all situate within said district. [34]

VIII.

Answering the eighth paragraph of the amended bill of complaint, this defendant admits that on the 4th day of June, 1910, the Washington Northern Railroad Company made, executed and delivered to the Mississippi Valley Trust Company, as trustee, a certain mortgage and deed of trust, covering certain property described in said paragraph of said amended bill of complaint, and admits that said mortgage contained a provision that all after acquired property by the railroad company should become a part of the security under the said mortgage or deed of trust; admits that at the date of the execution of said mortgage and deed of trust the railroad company was engaged in the operation of certain railroad property owned by it; but as to whether the railroad property described in said paragraph is the railroad property now owned by the railroad company, this defendant has no knowledge. Admits that the railroad company has continued in the operation thereof up to the time of the commencement of this action; admits that subsequent to the 4th day of June, 1910, the railroad company acquired additional rights of way and that additional lines of railroad have been constructed, and extensions of the said railroad have been made and branches thereof been built and put into operation and are now owned by said railroad company, and that cars and other equipment have likewise been acquired. As to whether said railroad now extends northerly, northeasterly and northwesterly, or in any other

direction from the original northern terminus of said railroad, as described in said amended bill of complaint, this defendant has no knowledge. He admits that said mortgage was legally executed and acknowledged, and recorded on the 10th of June, 1910, in the office of the auditor of Skamania County, Washington, at [35] in book "I" at page 339 thereof of the mortgage records of Skamania County, Washington.

IX.

Answering the ninth paragraph of said amended bill of complaint, this defendant admits that the mortgage referred to in paragraph eight of the amended bill of complaint was executed by way of security for a bond issue in the aggregate sum of One Million Dollars ($1,000,000), and that one thousand (1000) negotiable bonds, each of the denomination of One Thousand Dollars ($1000), and numbered from one (1) to one thousand (1000) consecutively, were issued, and that said bonds were in substantially the form set forth in said paragraph of said amended bill of complaint. He admits that the debt represented by said bonds should bear interest at the rate of 6% per annum, payable on the first day of May and the first day of November of each year and that the principal of said bonds should become payable on the first of May, 1928, subject to certain provisions as to the prior payment contained in said bonds and said deed of trust.

X.

Answering paragraph ten of said amended bill of complaint, this defendant admits that the railroad

company covenanted to pay the bonds so issued under said mortgage and the interest thereon as the same matured, and admits that it covenanted to pay all taxes and assessments, and to pay mechanics' liens and other liens which might have priority over said mortgage, and that said bonds should constitute at all times until paid a first lien upon the property. That as to whether said mortgage provided that the trustee should have a lien, prior to that the bonds, for money advanced for the payment of insurance, taxes, assessments, or other liens, or as to whether the [36] said trustee should have a reasonable sum for its services in protecting the property, or as to whether such advances made by the trustee should be deemed a part of the debt secured by the mortgage or deed of trust, this defendant has no knowledge.

That as to whether it was provided in said mortgage that if default should be made in the payment of any sum of money called for by said bonds, or in the performance of any other covenant on the part of the railroad company, in case said *said* default should continue for thirty days after written notice, the Mississippi Valley Trust Company might, at its option, declare the entire principal of the bonds then outstanding due and payable by the railroad company, or whether the Mississippi Valley Trust Company should be empowered to foreclose in such case, this defendant has no knowledge.

That as to whether of the proceeds of the mortgage foreclosure sale the Trust Company should be entitled to compensation for its services, or for its

expenses, or for its attorney's fees, this defendant has no knowledge.

That as to whether it was provided in said mortgage that upon any foreclosure sale being made of the mortgaged premises the principal of all the bonds secured thereby and then outstanding should become due and payable, this defendant has no knowledge.

That as to whether the railroad company consented to the appointment of a receiver and to his custody of the property, or as to the application on the expenses of the trustee and the debt secured by the said mortgage of any moneys and proceeds of the sale of the property in the hands of the receiver, this defendant has no knowledge.

That as to whether it was provided in said mortgage that it should be competent for the receiver to operate the railroad [37] *the railroad company* or to carry on any of the operations of the railroad company, or whether the railroad company consented to the operation of its property by said receiver, this defendant has no knowledge.

XI.

Answering the eleventh paragraph of the amended bill of complaint, this defendant admits that the interest called for by the bonds described in the complaint, up to and including the first of May, 1912, has been paid. That as to whether the interest maturing on the first of November, 1912, has been paid, or whether the interest maturing on the first of May, 1913, has been paid, or whether the interest maturing on the first of November, 1913, has been paid, this defendant has no knowledge.

That as to whether the interest has been demanded by the Mississippi Valley Trust Company and the bondholders, or as to whether the railroad company has failed or neglected to pay the same or the whole thereof, or any part thereof, this defendant has no knowledge.

That as to whether the railroad company has neglected to pay the taxes for the years 1912 and 1913, this defendant has no knowledge. That as to whether taxes have been legally levied upon said property, or as to whether the Trust Company has elected to declare the entire debt due and owing, this defendant has no knowledge.

That as to whether the Trust Company served notice upon the railroad company in writing and pursuant to the provisions of the mortgage, of its demand for the payment of the delinquent interest, as alleged in the amended bill of complaint, or of its election to declare the entire debt due and owing unless the money so due and unpaid was paid within thirty days from the date of such notice, or as to whether any notice was given [38] on account of any alleged default, this defendant has no knowledge. Neither has he knowledge as to whether such notice was given more than thirty days before the commencement of this action, or whether any notice of any kind was given by the trustee or the bondholders, in accordance with the provisions of the mortgage.

XII.

Answering the twelfth paragraph of the amended bill of complaint, this defendant says: That as to

whether it was provided in said mortgage that the security might be sold either as an entirety or in parcels, or that the property could not be sold to advantage, except as an entirety, or that it would be impracticable to operate the same except under one ownership, or that an attempt to sell the property piecemeal or in parcels would result in a sacrifice thereof, or that it was necessary for the conservation of the property and the protection of the lien thereon that the said property should be sold as an entirety, this defendant has no knowledge.

XIII.

Answering the thirteenth paragraph of said amended bill of complaint, this defendant says: That as to whether the railroad company has defaulted in the payment of its obligations or any of them prior to the commencement of this action he has no knowledge. That as to whether it was threatened with attachments or levies upon its property, or whether it was unable to operate its property or protect the same at the time of the commencement of this action, this defendant is not advised. That as to whether said railroad company was at the time of the institution of this suit unable to pay its taxes and lawful assessments levied upon its said property or to be levied thereon, this defendant has no knowledge. knowledge. [39]

That as to whether it was necessary to have a receiver of the property of the railroad company appointed at the time of the commencement of this action, or at all, this defendant has no knowledge.

XIV.

Answering the fourteenth paragraph of said amended bill of complaint, this defendant admits that on the 4th of June, 1910, the Oregon-Washington Timber Company executed to the Mississippi Valley Trust Company its certain mortgage or deed of trust, covering certain real and personal property, but as to whether the property described in said paragraph fourteen is a correct description of said property, this defendant is not advised. He admits that said mortgage contained a provision covering after acquired property by said timber company; admits that the mortgage was recorded in the office of the auditor of Skamania County, Washington, in book "I" of mortgages at page 296 thereof, but as to whether said mortgage constitutes in law a first lien and encumbrance upon said property and the whole thereof, this defendant is not advised.

XV.

Answering the fifteenth paragraph of said amended bill of complaint, this defendant admits that the mortgage executed by the Oregon-Washington Timber Company to the Mississippi Valley Trust Company was given as security for bonds in the aggregate sum of Six Hundred Thousand Dollars ($600,000), numbered from one (1) to six hundred (600), payable to bearer and bearing interest at the rate of 6% per annum, interest payable on the first day of May and the first day of November of each year; admits that by the terms of said bonds $30,000 thereof matured on the first of May, 1912, and that a like amount matured at [40] intervals of six

months thereafter, and that the interest on said bonds was evidenced by coupons and that the bonds and coupons were negotiable in form and payable to bearer; but as to whether said $600,000 of bonds were legally authorized, or as to whether they constituted a legal and binding obligation of the Oregon-Washington Timber Company, or as to whether they were executed for a purpose, or whether there was any consideration for the execution of said bonds, this defendant is not fully advised, and leaves complainants to their proof.

XVI.

Answering the sixteenth paragraph of said amended bill of complaint, this defendant admits that upon the execution of the mortgage given by the Washington Northern Railroad Company to the Mississippi Valley Trust Company, described in the amended bill of complaint, the defendant Oregon-Washington Timber Company attempted to purchase from the Washington Northern Railroad Company the entire issue of bonds secured by the mortgage described in the amended bill of complaint, given by the Washington Northern Railroad Company to the Mississippi Valley Trust Company; but as to whether said attempted sale was for a valuable consideration this defendant is without knowledge. That as to whether the timber company became the owner of the said entire issue of bonds this defendant is not advised. Neither is he advised as to whether the acts performed in the attempt to purchase said bonds constituted a sale of the bonds by the railroad company to the timber company.

This defendant admits that after such attempted sale of said bonds by the railroad company to the timber company bonds of said issue by the railroad company to the amount of Six Hundred Thousand Dollars ($600,000) and numbered from one (1) to six hundred (600), inclusive, were attempted to be sold, assigned [41] and transferred to the Mississippi Valley Trust Company in and by the mortgage described in paragraph fourteen of the amended bill of complaint and as part security for the $600,000 of bonds issued by the timber company and secured by the mortgage or trust deed of that company to the Mississippi Valley Trust Company. This defendant admits that it was provided in the mortgage given by the Oregon-Washington Timber Company to the Mississippi Valley Trust Company that when the bonds secured thereby should be paid and cancelled by the trustee, a like amount par valuc of the bonds of the Washington Northern Railroad Company, so attempted to be conveyed and transferred as part of said security, should also be cancelled by the trustee and returned to the Washington Northern Railroad Company, or delivered to the Washington Northern Railroad Company uncancelled, at its option.

XVII.

Answering the seventeenth paragraph of the amended bill of complaint, this defendant says: That as to whether by the terms of the mortgage given by the Oregon-Washington Timber Company to the Mississippi Valley Trust Company it was provided that the mortgagor or timber company would annually pay into the hands of the Trustee a sum of

money not less than Forty-five Thousand Dollars ($45,000) to be derived from the logging of timber situated on the property described in the said mortgage, this defendant has no knowledge. That he has no knowledge as to whether such payments would have created a sinking fund for the retirement of the bonds of the Oregon-Washington Timber Company in the sum of Ninenty Thousand Dollars ($90,000), or in any other sum.

XVIII.

Answering the eighteenth paragraph of said amended bill of [42] complaint, this defendant says: That he has no knowledge as to the exact formalities required by the mortgage for the appointment of a cotrustee of said mortgage by the Mississippi Valley Trust Company; and that he has no knowledge as to whether the attempted appointment of the Union Trust Company as a cotrustee was made in accordance with the covenants and provisions of said mortgage.

XIX.

Answering the nineteenth paragraph of said amended bill of complaint, this defendant says that he has no knowledge as to the covenants of the mortgage with reference to the payment of taxes and assessments, or as to whether a failure to pay such taxes would constitute a default of the mortgage.

XX.

Answering the twentieth paragraph of said amended bill of complaint this defendant says: That as to whether the timber company has defaulted in the payment of the taxes on the property mentioned

in the mortgage of June 4th, 1910, for the years 1911, 1912 and 1913, or as to whether no part of said taxes have been paid, he has no knowledge. That as to whether a default has been made by the Oregon-Washington Timber Company in regard to the performance of any sinking fund provision contained in said mortgage, or as to whether the timber company has failed and neglected to pay the sum of $45,000 or any other sum into the sinking fund for the year 1912, or as to whether the timber company has failed to pay the sum of $45,000 or any other sum into the sinking fund for the year 1913, this defendant has no knowledge. That as to whether there has been a default in the payment of interest, except as hereinbefore stated, this defendant has no knowledge. That as to whether it was provided by the terms of the mortgage of the Oregon-Washington Timber Company to the Mississippi [43] Valley Trust Company that in case a default should be made in failing to perform the provisions thereof with regard to any sinking fund, or of taxes, or of interest, this defendant has no knowledge; neither has he any knowledge as to what demand should be made in the case of a default, or what notice should be given, or how the notice should be given. That as to whether on the second day of September, 1913, or any other time prior to the commencement of this action a demand in writing was made on the Oregon-Washington Timber Company for the payment of taxes, interest, or sinking fund obligation, or as to whether said payments have been made, or whether sixty days have elapsed since any notice was given, this defend-

ant has no knowledge; and he has no knowledge as to whether the complainants had the right to declare the entire debt due and owing, or as to whether they attempted to declare such debt due and owing.

XXI.

Answering the twenty-first paragraph of said amended bill of complaint, this defendants says: He admits that the entire bond issue secured by the mortgage executed by the Oregon-Washington Timber Company, amounting to $600,000 has been negotiated and sold and is now outstanding, except $30,000 of bonds which matured on the first day of May, 1912, which last mentioned bonds have been paid, and admits that the bonds which have been paid are numbered from one (1) to thirty (30) inclusive, for One Thousand Dollars each, that the same have been paid, cancelled and discharged, and admits that there was delivered by the Mississippi Valley Trust Company to the Washington Northern Railroad Company bonds in the sum of $30,000, which bonds the Washington Northern Railroad Company elected to have delivered to it uncancelled. He admits that Five Hundred and Seventy Thousand Dollars ($570,000) of the bonds issued by the Oregon-Washington [44] Timber Company have not been cancelled; but as to whether any portion of said bonds should have been cancelled this defendant is not fully advised, but avers that a portion of said bonds are unenforceable and should be cancelled, as will more fully appear in this answer. That as to what amount of interest is unpaid upon said bonds this defendant has no knowledge and leaves complainants to their proof.

XXII.

Answering the twenty-second paragraph of said amended bill of complaint, this defendant says: That as to whether it was provided in said mortgage that the trustees might take possession of said property directly or through a receiver to be appointed by a court of competent jurisdiction this defendant has no definite knowledge; that as to whether said Oregon-Washington Timber Company was insolvent at the time of the commencement of this action this defendant is not advised; but admits that at this time said Timber Company is unable to pay its obligations; that whether a necessity exists for the holding of the assets of said corporation by a receiver during the pendency of this action, this defendant is not advised.

XXIII.

Answering the twenty-third paragraph of said amended bill of complaint, this defendant says: That as to whether it was provided in said mortgage that the trustee under said mortgage should be allowed an attorney's fee and compensation to the receiver for the conduct of this foreclosure suit and for services performed by the trustee or trustees and their attorneys therein, or as to whether all of the costs and expenses, or any of the costs and expenses of said suit should be chargeable against the Oregon-Washington Timber Company, or against the security pledged under said mortgage, this defendant has no knowledge. [45]

XXIV.

Answering the twenty-fourth paragraph of said

amended bill of complaint, this defendant says: That he has no knowledge as to whether the Oregon-Washington Timber Company, the Washington Northern Railroad Company, and the Blazier Timber Company are controlled and dominated by the same set of officers; that he has no knowledge as to the present ownership of the stock of said corporations. He admits that there was an intimate connection between the officers of the said several companies at one time, but denies that the business of the Oregon-Washington Timber Company was wholly dependent upon the operation of the railroad of the Washington Northern Railroad Company, and denies that the operation of the Washington Northern Railroad Company is dependent upon the marketing of the timber upon the lands of the Oregon-Washington Timber Company; denies that the revenues of the Washington Northern Railroad Company are exclusively derived from the carriage of the timber products of the Oregon-Washington Timber Company, but admits that such service of the Oregon-Washington Timber Company furnishes a part of the revenues of said railroad company. That as to whether the Oregon-Washington Timber Company is a private carrier or a common carrier this defendant has no knowledge.

This defendant admits that the timber lands of the Oregon-Washington Timber Company, described in the amended bill of complaint contain a large body of timber, but as to its condition and whether it has been burned over, or would deteriorate in value if not marketed within a reasonable time this defend-

ant has no knowledge. That he has no knowledge as to whether said timber lands and the timber situated thereon are depreciating by reason of any fire that may have passed [46] through said timber.

XXV.

Answering the twenty-fifth paragraph of said amended bill of complaint, this defendant admits that the Washington Northern Railroad Company entered into a contract in writing with the Weist Logging Company and the Oregon-Washington Timber Company, under date of March 6th, 1911, relating to a certain logging outfit and property appurtenant thereto, which said property is particularly described in said contract; but whether said contract is recorded in book 2 at page 155 of the record of agreements of the county of Skamania, State of Washington, this defendant has no knowledge. That said contract was in part one of lease by the Weist Logging Company to the Washington Northern Railroad Company, with a privilege to purchase by the railroad company for the sum of $80,000. That said contract did not constitute a contract of purchase absolutely, but was merely conditional, with the title at all times reserved in the Weist Logging Company, and that the conditions contained in said contract or lease were never performed by the railroad company, and the title to the property never passed from the Weist Logging Company to the railroad company, and the railroad company never paid the $80,000 nor any part thereof, except the sum of about $30,000. And in this connection this defendant alleges that on the 30th of March, 1912, the railroad company, with

the consent of the Oregon-Washington Timber Company assigned to the Blazier Timber Company all of the property, rights and interest acquired by the railroad company under and by virtue of the contract of March 5th, 1911, and the Blazier Timber Company assumed payment of the balance necessary to be paid to the Weist Logging Company in order to procure title [47] to said property, the amount of the payment thus assumed being the sum of $45,000. That the said assignment was recorded in book 2 of Leases and Agreements, at page 226 of the records in the office of the auditor of Skamania County, Washington. That the said sum of $45,000 was paid by the Blazier Timber Company to the Weist Logging Company, and a conveyance was duly executed by the Weist Logging Company directly to the Blazier Timber Company of the property described in said lease or contract, executed by the Weist Logging Company, the Washington Northern Railroad Company and the Oregon-Washington Timber Company, under date of March 6th, 1911, and that all of the property thus transferred by the Weist Logging Company to the Blazier Timber Company is covered by and recorded in the deed of trust bearing date of March 1st, 1912, executed by the Washington Northern Railroad Company, the Oregon-Washington Timber Company and the Blazier Timber Company to this defendant, William W. Crawford, trustee, which mortgage or deed of trust will be more particularly described hereinafter in this answer. That none of the property acquired by the Blazier Timber Company from the Weist Logging

Company was ever included in or came under the provisions of the mortgage executed by the Washington Northern Railroad Company to the Mississippi Valley Trust Company under date of June 4th, 1910, and never came within or was included in or brought under the provisions of said mortgage; and that said property was never subject to the lien of said mortgage so executed by the Washington Northern Railroad Company to the Mississippi Valley Trust Company and was never subject to or brought under the lien of the mortgage executed by the Oregon-Washington Timber Company to the Mississippi Valley Trust Company under date of June 4th, 1910, and particularly referred to in the amended bill of complaint. [48]

Further answering said paragraph twenty-five this defendant denies that the assignment of the property of the Weist Logging Company was taken with any knowledge of the claims of the Mississippi Valley Trust Company; denies that said property acquired from the Weist Logging Company was pledged under the provisions of the mortgage of the Washington Northern Railroad Company to the Mississippi Valley Trust Company, for the reason that the Washington Northern Railroad Company never had any right, title or interest in said property or any part thereof, and that the same did not constitute any part of the security or property covered by said mortgage of the Washington Northern Railroad Company to the Mississippi Valley Trust Company, and for the reason that the Mississippi Valley Trust Company had no claim or lien thereon of any nature or kind whatsoever.

XXVI.

Answering paragraph twenty-seven of said amended bill of complaint, this defendant admits that on the first of March, 1912, the defendants Washington Northern Railroad Company, Oregon-Washington Timber Company and the Blazier Timber Company made, executed and delivered to this defendant William W. Crawford, trustee, a certain mortgage or deed of trust, covering substantially all of the property of the Blazier Timber Company, described in the amended bill of complaint and all of the property of the Blazier Timber Company as well, and avers that said mortgage covered all of the property acquired by the Blazier Timber Company from the Weist Logging Company, as hereinbefore set forth.

This defendant admits that said mortgage so executed to the said William W. Crawford, trustee, covered and embraced all of the property described and referred to in the mortgages executed by the Washington Northern Railroad Company and the Oregon-
[49] Washington Timber Company to the Mississippi Valley Trust Company under date of June 4th, 1910, and recognizes the priority of the said two mortgages as to the property described in said two mortgages, but avers that said mortgage so executed to said Crawford embraced other property than that described in the said mortgages executed to the Mississippi Valley Trust Company by the railroad company and by the timber company; and this defendant denies that said mortgages executed by the railroad company and the timber company to the trust com-

pany have priority over the mortgage executed to this defendant, as will more fully appear in this answer.

This defendant admits that the said defendant William W. Crawford claims a right in and a lien upon the property described in the said two mortgages executed by the railroad company and the timber company to the trust company.

XXVII.

Answering the twenty-eighth paragraph of said amended bill of complaint, this defendant admits that on the fourth of June, 1910, the Oregon-Washington Timber Company executed a second mortgage on the property described in paragraph fourteen of the amended bill of complaint for the security of $400,000 of second mortgage bonds, and admits that said bond issue was sold by the defendant Oregon-Washington Timber Company to the defendant Washington Northern Railroad Company; and admits that as further security for said second mortgage bonds of the timber company, assigned and transferred to the Washington Northern Railroad Company $400,000 in amount of the bonds of the Washington Northern Railroad Company; admits that the Mississippi Valley Trust Company is the Trustee under the second mortgage of the timber company and that the said $400,000 of bonds of the Washington Northern Railroad Company together with the [50] second mortgage bonds of the Oregon-Washington Timber Company, were lodged with the Mississippi Valley Trust Company.

This defendant admits that under the mortgage

executed to the defendant William W. Crawford, trustee, the Washington Northern Railroad Company sold and assigned said $400,000 of second mortgage bonds of the Oregon-Washington Timber Company, and in this connection this defendant avers that said assignment of the $400,000 of the second mortgage bonds of the Oregon-Washington Timber Company carried with it the assignment of the $400-, 000 of the first mortgage bonds of the Washington Northern Railroad Company, numbered from six hundred one (601) to one thousand (1000) both inclusive. This defendant admits that said mortgage to this defendant William W. Crawford also assigned the $600,000 of the first mortgage bonds of the railroad company numbered from one (1) to six hundred (600), inclusive, as said bonds are from time to time released and delivered or releasable and deliverable by the Mississippi Valley Trust Company under the terms and provisions of the first and second mortgages of the Oregon-Washington Timber Company, and alleges that under the said mortgage to the said William W. Crawford the timber company assigned all of its right, title and interest in and to the $400,000 second mortgage bonds, and also all of the right, title and interest in all of the bonds of the railroad company as they are from time to time released and delivered or releasable and deliverable under the terms and provisions of the first and second mortgages respectively of the Oregon-Washington Timber Company.

This defendant admits that it was provided in a certain agreement, dated June 4th, 1910, of the

Washington Northern Railroad Company and the Oregon-Washington Timber Company, that the [51] proceeds of the sale of the $400,000 of second mortgage bonds of the timber company should be used for future extensions and betterments or equipments of the railroad company, after the expenditure of the proceeds of the sale of the $600,000 of first mortgage bonds of the timber company. But in this connection this defendant avers that the $400,000 second mortgage bonds of the timber company were pledged under the mortgage to the defendant William W. Crawford, trustee, by the joint action of the Washington Northern Railroad Company and the Oregon-Washington Timber Company.

This defendant denies that the rights of the said defendant Crawford in and to the $400,000 of the second mortgage bonds of the timber company, with the $400,000 of first mortgage bonds of the railroad company securing the same, were acquired with notice that the proceeds of said $400,000 of second mortgage bonds of the timber company should be applied in building extensions of the railroad company and in equipping the same.

Defendant further denies that he had any knowledge as to how the proceeds of the said $400,000 second mortgage bonds of the timber company were to be expended. And in this connection this defendant avers that the said William W. Crawford, trustee, as owner of $400,000 in amount of the first mortgage bonds of the railroad company, numbered from six hundred one (601) to one thousand (1000), inclusive, and as the owner of $30,000 in amount

of the first mortgage bonds of the railroad company numbered from one (1) to thirty (30) inclusive, is entitled to participate with the holders of the $570,000 in amount of the bonds of the Washington Northern Railroad Company in the proceeds of the sale of the property covered by the mortgage of the railroad company; provided, that the holders of said $570,000 of [52] bonds of the railroad company are not estopped by their action from participating in the proceeds of the sale of the property, and as to such portion of the said $570,000 of said bonds as may be held by parties who are estopped to participate in the proceeds of the sale of the property of the railroad company this defendant avers that he is entitled to priority. But this defendant denies that it is necessary for the protection of the complainants that this priority as between the holders of the first mortgage bonds of the railroad company should be determined in this action, which he alleges is an action brought by two different mortgagees against two different mortgagors securing two different obligations and covering two different sets and classes of property.

XXVIII.

Answering the twenty-ninth paragraph of said amended bill of complaint, this defendant admits the allegations contained in said paragraph.

XXIX.

Answering the thirtieth paragraph of said amended bill of complaint, this defendant denies the allegations in said paragraph contained.

And for further and first affirmative defense to

complainants' amended bill of complaint, this defendant alleges:

1.

That said amended bill of complaint shows upon its face that two separate causes of action have been improperly united in said amended bill of complaint, and that said amended bill of complaint is multifarious, said amended bill of complaint embracing: (a) an action by the Mississippi Valley Trust Company to foreclose a mortgage executed by the Washington Northern [53] Railroad Company to the Mississippi Valley Trust Company, Trustee, to secure an issue of bonds in the aggregate amount of One Million Dollars ($1,000,000); (b) an action by the Mississippi Valley Trust Company and the Union Trust Company, Trustees, to foreclose a mortgage executed by the Oregon-Washington Timber Company, a corporation, to the Mississippi Valley Trust Company and the Union Trust Company to secure an issue of bonds of the Oregon-Washington Timber Company in the aggregate amount of Six Hundred Thousand Dollars ($600,000), and that by so doing there is a misjoinder of causes of action in said amended bill of complaint.

2.

That there is a misjoinder of parties plaintiff in that the Mississippi Valley Trust Company, trustee under the mortgage of the Washington Northern Railroad Company, is joined in a complaint with the Mississippi Valley Trust Company and the Union Trust Company, trustees under the mortgage executed by the Oregon-Washington Timber Company.

3.

That there is a misjoinder of parties defendant in that the Washington Northern Railroad Company, which executed the mortgage upon the property of the railroad company to secure an issue of bonds by the railroad company, is joined as a defendant with the Oregon-Washington Timber Company, which executed a mortgage to the Mississippi Valley Trust Company and the Union Trust Company to secure an issue of bonds by the Oregon-Washington Timber Company.

4.

That the amended bill of complaint shows upon its face that the Mississippi Valley Trust Company holds $570,000 of [54] the bonds of the Washington Northern Railroad Company as collateral security for the payment of the bonds issued by the Oregon-Washington Timber Company, and the amended bill of complaint discloses an atttempt to foreclose two separate mortgages executed by two different parties, involving two distinct subject matters, in one action, and that the causes of action so attempted to be joined are not joint; and the liability asserted against the Oregon-Washington Timber Company is distinct, separate and different from the liability asserted against the defendant, the Washington Northern Railroad Company, and sufficient grounds are not shown for uniting the said causes of action in order to promote the convenient administration of justice.

And for a further and second affirmative defense to said amended bill of complaint, this defendant alleges:

1.

That on or about the first of March, 1912, the Washington Northern Railroad Company, the Oregon-Washington Timber Company and the Blasier Timber Company executed and delivered to this defendant, William W. Crawford, trustee, a certain mortgage or deed of trust, pursuant to a resolution unanimously adopted by all of the trustees and all of the stockholders of said three respective companies, upon all of the property of every nature and kind of each of said companies, to secure an issue of bonds in the sum of Four Hundred and Twenty-five Thousand Dollars ($425,000), known as "First and General Lien Six Per Cent Gold Notes," numbered from one (1) to four hundred twenty-five (425) inclusive, of the denomination of One Thousand Dollars ($1,000) each, and maturing at different dates and times, the last of which notes matured, according to the terms and provisions of [55] the trust deed, on March 1st, 1917, which said property so conveyed or mortgaged to this defendant, William W. Crawford, is particularly set forth in said deed of trust of March 1st, 1912, which has been duly recorded in the office of the auditor of Skamania County, Washington; and the said mortgage by said several companies to this defendant is hereby by reference incorporated in this answer, and this defendant prays leave at any and all times to present the said mortgage, or a true copy thereof for consideration by the Court in further elaboration of this defendant's answer.

2.

That in the mortgage of March 1st, 1912, executed by the said several companies to this defendant Crawford, there is contained, among other provisions, the following:

> "It is understood and hereby expressly declared: That the property of the Railroad Company is now subject to the lien of that certain mortgage deed of trust dated June 4, A. D. 1910, executed by the Railroad Company to the Mississippi Valley Trust Company, Trustee (a Missouri corporation having its principal office and place of business in the City of St. Louis in the State of Missouri), and recorded in the office of the County Auditor of Skamania County, Washington, in Book "I" of Mortgages on pages 339 to 356, both inclusive, in order to secure the payment of the principal sum of and interest on that certain issue of first mortgage six per cent gold bonds of the Railroad Company, being 1000 bonds, numbered from 1 to 1000, both inclusive, and of the denomination of $1000 each, dated as of June 4, A. D. 1910, and due May 1, A. D. 1928.
>
> That 600 of the aforesaid bonds, being bonds numbered from 1 to 600, both inclusive, have been pledged or assigned as collateral security for that certain issue of first mortgage six per cent gold bonds of the Timber Company, aggregating the principal sum of $600,000, issued under and secured by a mortgage deed of trust executed by the Timber Company to the said

Mississippi Valley Trust Company, Trustee, under date of June 4, A. D. 1910; which said 600 bonds of the Railroad Company, now held by Mississippi Valley Trust Company, Trustee, as collateral security as aforesaid, are by the terms of said mortgage deed of trust of the Timber Company, required to be delivered uncancelled to the Railroad Company upon its demand from time to time, in like amounts and in the order of their corresponding numbers, as the said bonds of the Timber Company are paid.

That 400 of the aforesaid bonds of the Railroad Company, being bonds numbered 601 to 1000, both inclusive, have been pledged or assigned as collateral security for that certain [56] issue of second mortgage six per cent bonds of the Timber Company, aggregating the principal sum of $400,000, issued under and secured by a second mortgage deed of trust, executed by the Timber Company to the said Mississippi Valley Trust Company, Trustee, under date of June 4, A. D. 1910; which said 400 bonds of the Railroad Company now held by the Mississippi Valley Trust Company as collateral security as aforesaid, are by the terms of the said second mortgage deed of trust of the Timber Company required to be delivered uncancelled to the Railroad Company upon its demand from time to time, in like amounts and in the order of their corresponding numbers, as the said second mortgage bonds of the Timber Company are paid.

That said $400,000 second mortgage bonds of the Timber Company were duly issued to and the Railroad Company is now the lawful owner of the same, and is authorized and empowered to use, negotiate, assign and pledge the same for its corporate purposes.

That the Railroad Company is duly authorized and empowered to issue, use, negotiate, pledge or assign, for its corporate purposes, its said bonds as they are surrendered and delivered to *is* as aforesaid.

Now, therefore, for the consideration aforesaid, and as a part of the security furnished by the Railroad Company for the payment of the principal of and interest on the notes issued hereunder and secured hereby, the Railroad Company does hereby further sell, assign, pledge, transfer and set over to the Trustee (a) said $400,000 second mortgage bonds of the Timber Company; (b) the said $1,000,000 first mortgage bonds of the Railroad Company as they are from time to time released and delivered, or releasable and deliverable, by the said Mississippi Valley Trust Company under the terms and provisions of the said first and second mortgage deeds of trust, respectively, of the Timber Company."

3.

That in the said mortgage to the said Crawford there is also contained, among other things, the following provision:

"It is understood and hereby expressly de-

clared that the property of the Timber Company is now subject to the lien of two mortgage deeds of trust, viz:

(a) A first mortgage deed of trust, dated June 4, A. D. 1910, executed by the Timber Company to the Mississippi Valley Trust Company, hereinabove mentioned (and recorded in the office of the County Auditor of Skamania County, Washington, in Book "I" of Mortgages, at page 296) to secure the payment of the principal of and interest on that certain issue of 600 first mortgage six per cent gold bonds of the Timber Company, numbered from one (1) to six hundred (600), both inclusive, of the denomination of One Thousand Dollars ($1000) each, dated June 4, 1910, and maturing serially $30,000 in amount on May 1st and November 1st in each of the years 1912 to 1921, both inclusive, and by and under which mortgage deed of trust the first mortgage bonds of the Railroad Company to the amount of $600,000 face value (being bonds numbered 1 to 600) have been pledged or assigned to the said Mississippi Valley Trust Company, Trustee, as further and [57] collateral security for said first mortgage bonds of the Timber Company, but which said bonds of the Railroad Company are to be surrendered to it from time to time as the said first mortgage bonds of the Timber Company are paid, as hereinabove more fully stated.

(b) A second mortgage deed of trust, dated

June 4, A. D. 1910, executed by the Timber Company to the said Mississippi Valley Trust Company (and recorded in the office of the county auditor of Skamania County, Washington, in Book "I" of Mortgages, at page 316) to secure the payment of the principal of and interest on that certain issue of four hundred (400) second mortgage six per cent gold bonds of the Timber Company, numbered from one (1) to four hundred (400), both inclusive, of the denomination of $1000 each, dated June 4, 1910, and maturing serially $30,000 in amount on May 1 and November 1 in each of the years 1922 to 1928, both inclusive; and by and under which mortgage deed of trust the first mortgage bonds of the Railroad Company to the aggregate amount of $400,000 face value (being bonds numbered 601-1000) have been pledged or assigned to the said Mississippi Valley Trust Company, as further and collateral security for said second mortgage bonds of the Timber Company, but which said bonds of the Railroad Company are to be surrendered to it from time to time as the said second mortgage bonds of the Timber Company are paid as hereinabove more fully stated.

All of said first mortgage bonds of the Timber Company have been sold and *issued are* now outstanding; and all of said second mortgage bonds of the Timber Company have been duly sold and issued and the Railroad Company is now the lawful owner thereof.

NOW, THEREFORE, for the consideration aforesaid and as a part of the security furnished by the Timber Company for the payment of the principal of and interest on the notes issued hereunder and secured hereby, the Timber Company does hereby further sell, assign, pledge, transfer and set over to the Trustee all of its right, title and interest, in, to and under its aforesaid $400,000 second mortgage bonds, and also said bonds of the Railroad Company as they are from time to time released and delivered, or releasable and deliverable, under the terms and provisions of the first and second mortgage deeds of trust, respectively, of the Timber Company."

4.

That by virtue of the foregoing provisions this defendant as trustee, became the owner and holder of $400,000 of the second mortgage bonds of the Oregon-Washington Timber Company, together with $400,000 of the first mortgage bonds of the Washington Northern Railroad Company which were pledged as collateral security for the payment of the $400,000 of second mortgage [58] bonds of the Oregon-Washington Timber Company, and which were at the time of the execution of said mortgage lodged with the Mississippi Trust Company; and this defendant also, by virtue of said mortgage, became entitled to the $600,000 of first mortgage bonds of the railroad company, held as collateral security by the Mississippi Valley Trust Company for the payment of the $600,000 first mort-

gage bonds of the Oregon-Washington Timber Company, as such first mortgage bonds of the Railroad Company are from time to time released and delivered or releasable and deliverable by the Mississippi Valley Trust Company under the terms and provisions of the first and second mortgages of the timber company, referred to in the amended bill of complaint; and under and by virtue of the provisions of said mortgage to the defendant Crawford of March 1st, 1912, this defendant acquired a first lien upon all of the property of the Blazier Timber Company, which is particularly desribed in said mortgage to the said Crawford, a description of which property is hereby incorporated in this answer by reference to the record of the mortgage to the said Crawford in the office of the auditor of Skamania County, Washington. That the $425,000 "First and General Lien Six Per Cent Gold Notes" have been negotiated and the proceeds therefrom paid over to the Washington Northern Railroad Company and the Washington-Oregon Timber Company and the Blazier Timber Company.

That the property mortgaged by the Blazier Timber Company to secure the said $425,000 notes described in the Crawford mortgage is of less value than $425,000, and that such security is wholly inadequate to pay said notes, or any considerable part thereof, and that this defendant Crawford as trustee will be compelled to rely, in large part, for the payment of the $425,000 upon the property mortgaged to him by the Oregon-Washington [59] Timber Company and the Washington Northern

Railroad Company. That the said companies are at this time insolvent and unable to pay any considerable part of their outstanding obligations, and that this defendant has a vital interest in having the proceeds of the sale of the properties of the Washington Northern Railroad Company and the Oregon-Washington Timber Company applied toward the payment of the $425,000 notes in so far as the same are applicable, under the terms and provisions of the mortgage to said William W. Crawford of March 1st, 1912; and is vitally interested in having determined what portion, if any, of the proceeds of the sale of the properties of the railroad company and of the timber company should be applied toward the payment of the $570,000 of first mortgage bonds of the timber company held by the Mississippi Valley Trust Company as Trustee.

5.

That under the provisions of the mortgages executed by the Oregon-Washington Timber Company to the Mississippi Valley Trust Company it was provided that whenever a bond, either first or second, of the timber company was paid by the timber company, a bond for the same amount of the Washington Northern Railroad Company was to be returned to the railroad company, cancelled or uncancelled, at the option of the railroad company, and the trustee was required to return to the railroad company such bond upon the payment of one of the timber company's bonds, and similar provisions were inserted in said mortgages for the surrender of the interest coupons appertaining to the

railroad company's bonds from time to time as the interest coupons appertaining to the timber company's bonds were paid. And the alleged purchase by the timber company of the bonds of the railroad company discloses that it was the intention of the parties **[60]** to use the bonds of the railroad company merely as collateral security for the bonds of the timber company.

That the resolutions adopted by the trustees and stockholders of the Oregon-Washington Timber Company, and of the Washington Northern Railroad Company, and the agreement between the railroad company and the timber company disclose that the proceeds of the $600,000 first mortgage bonds of the timber company, amounting to $540,000, were to be used as follows:

a. For the retirement of the outstanding mortgage of $150,000 then on the property of the railroad company, which mortgage was pledged as additional collateral to secure the payment of a first mortgage for the same amount, it being understood that the payment of $150,000 should operate as a release of both the $150,000 mortgage of the railroad company and the $150,000 mortgage of the timber company $150,000.00

b. For the payment of the floating indebtedness of the railroad company.. ..... 125,000.00

c. For extensions, betterments and improvements of the property of the railroad company *915,000.00*

d. Loaned to the timber company by the railroad company 50,000.00

—all of which is set forth in a certain agreement dated June 4, 1910, executed by the Washington Northern Railroad Company and the Oregon-Washington Timber Company, which said agreement is in words and figures following, to wit:

"SALE OF $1,000,000 WASHINGTON NORTHERN RAILROAD COMPANY 6% BONDS.

Portland, Oregon, June 4, 1910.

Washington Northern Railroad Company,
Portland, Oregon.

Dear Sirs:

We understand that you are proposing to make certain extensions to your railroad (formerly owned by the Cape Horn Railroad Company), the result of which will be to increase our facilities for marketing the timber from our lands in Skamania County, Washington, and that you have authorized an issue of One Million Dollars ($1,000,000) par value first mortgage six per cent gold bonds, dated the 4th day of June, 1910, due on the first day of May, 1928, and secured by a first mortgage on your railroad property. [61]

We propose to buy from you the entire issue of One Million Dollars ($1,000,000) par value of said bonds and pay you therefor Four Hundred Thousand Dollars ($400,000) par value of our bonds as hereinafter described, and the sum of Five Hundred

and Forty Thousand Dollars in money, said money to be used for the following purposes:

One Hunderd and Fifty Thousand Dollars ($150,000) to be used for the present or future payment or retirement of the outstanding first mortgage for $150,000 now on your railroad property, which mortgage is now pledged an additional collateral to secure the payment of a first mortgage for the same amount on our lands and timber in Skamania County, Washington, it being understood that both of said $150,000 first mortgages shall be paid and released by the payment of said $150,000.

$125,000 to be used for the payment of the present floating indebtedness of the Cape Horn Railroad Company.

$215,000 to be used for extensions, betterments and equipment to your railroad property.

$50,000 to be loaned by you to us on our note for that amount dated the 4th day of June, 1910, due on demand, with interest from its date at the rate of six per cent per annum. Said loan and interest to be repaid by us by the payment to you (until said loan and interest are paid) of fifty (50) cents on every one thousand (1000) feet, board measure, of logs taken from our timber lands in Skamania County, Washington, after January 1st, 1911, and we agree to take from said lands and ship over your railroad at least sixty millions (60,000,000) feet of logs every year, beginning January 1st, 1911, until all the merchantable timber on said lands is exhausted, and upon our failure so to do and to make said payments of fifty (50) cents for every 1000 feet

of logs we agree to at once pay said note and interest, or the balance due or to become due thereon in cash. Said payments to be made on or before the 10th day of each month for all logs taken during the previous month.

As a further consideration for the sale to us of said One Million Dollars ($1,000,000) of your bonds, and without any new or further consideration, we agree to sell and deliver to you Four Hundred Thousand Dollars ($400,000) par value six per cent gold bonds issued by us, dated the 4th day of June, 1910, due serially $30,000 par value every six months, beginning May 1st, 1922, the last $40,000 thereof maturing May 1st, 1928, and secured by second mortgage on our lands and timber in Skamania County, Washington, and secured also by $400,000 par value of the $1,000,000 par value of bonds now proposed to be purchased by us from you; said $400,000 par value of our bonds so sold to you, however, or the proceeds of the sale thereof, to be used by you only for future extensions, betterments or equipment to your railroad, after the expenditure of the said sum of $540,000 above mentioned.

The $1,000,000 par value of your bonds hereby proposed to be purchased by us are all to be executed and delivered by you to the trustee in the mortgage securing the same, and to be by said trustee duly authenticated, and $600,000 par value thereof to be deposited with the Mississippi Valley Trust Company of St. Louis, Missouri, to be by it held in trust as security under the terms of a certain first mortgage dated June 4, 1910, executed

[62] by us to said Mississippi Valley Trust Company to secure an issue of $600,000 par value 6% gold bonds issued by us, and the remaining $400,000 par value of your bonds hereby proposed to be purchased are to be deposited with the said Mississippi Valley Trust Company to be by it held in trust as security under the terms of a certain second mortgage dated June 4th, 1910, executed by us to said Trust Company to secure an issue of Four Hundred Thousand Dollars ($400,000) par value second mortgagee 6% gold bonds issued by us, which latter $400,000 par value second mortgage bonds are the bonds hereinabove agreed to be sold and delivered to you.

The said sum of $540,000 to be deposited as needed for the purposes mentioned above to your credit at said Mississippi Valley Trust Company and to be paid out on checks signed by you and countersigned by said Trust Company for said purposes.

Your agreement to the above proposition to be indicated by your written acceptance indorsed hereon.

Yours truly,

OREGON-WASHINGTON TIMBER COMPANY.

By J. E. BLAZIER,
President.

Accepted: June 4, 1910.

WASHINGTON NORTHERN RAILROAD COMPANY.

By E. J. BLAZIER,
President.

I, E. J. Blazier, Secretary of the Oregon-Washington Timber Company, hereby certify that the foregoing is a true and correct copy of the original agreement covering sale of $1,000,000 Washington Northern Railroad Company 6 % bonds by said railroad company to said timber company; said agreement dated June 4th, 1910, and accepted by said railroad company on same date.

In witness whereof, I have hereunto set my hand and the seal of said Oregon-Washington Timber Company, this 21st day of February, 1912.

[Seal] E. J. BLAZIER,
Secretary.

That the resolutions adopted by the trustees and stockholders of the Washington Northern Railroad Company and the Oregon-Washington Timber Company as to the above application of the proceeds of the $600,000 of the first mortgage bonds of the timber company by the railroad company, and the fact of the foregoing agreement between the railroad company and the timber company were known to the Mississippi Valley Trust Company at **[63]** the time of the execution and delivery to it of the $600,000 first mortgage bonds of the timber company.

6.

That on the 4th of June, 1910, the Oregon-Washington Timber Company entered into an agreement with Little & Hays of St. Louis, Missouri, for the sale of the $600,000 first mortgage bonds of the timber company, which said agreement also discloses that the proceeds of the sale of said bonds were to

be applied to the purposes stated in the preceding paragraph, and that the proceeds of the sale of said bonds were to be placed to the credit of the Mississippi Valley Trust Company and paid out by the Trust Company upon the check of the railroad company for the purposes above stated, a copy of which agreement is as follows, to wit:

"Sale of $600,000 OREGON–WASHINGTON TIMBER COMPANY 6% BONDS.

Portland, Oregon, June 4, 1910.

Messrs. Little & Hays,
St. Louis, Missouri.

Gentlemen:

We propose to sell to you our entire issue of $600,000 par value of 6% gold bonds, secured by a first mortgage on our lands and timber in Skamania County, Washington, and secured also by $600,000 par value of gold bonds of the Washington Northern Railroad Company, secured by a first mortgage on its railroad and equipment; and we also propose to include in said sale $999,300 par value of the capital stock of said Washington Northern Railroad Company, all for the sum of $540,000.

Said sum of $540,000 to be used for the benefit of said Washington Northern Railroad Company, which is purposing to extend its railroad through our lands in Skamania County, Washington, thereby increasing our facilities for marketing our timber; and said sum is to be used for the following specific purposes, to wit:

$150,000 to be used for the present or future payment or retirement of the outstanding first mortgage

for $150,000 on the [64] property of said railroad company, which mortgage is now pledged as additional collateral to secure the payment of a first mortgage of the same amount on our lands and timber in Skamania County, Washington, its being understood that both of said $150,000 first mortgages shall be paid and released by the payment of said $150,000.

$125,000 to be used for the payment of the present floating indebtedness of the Cape Horn Railroad Company.

$215,000 to be used for extensions, betterments and equipments of the Washington Northern Railroad.

$50,000 to be loaned by said railroad company to us on our note.

The $500,000 par value of bonds hereby offered to be sold are to be duly executed by us and deposited with the Mississippi Valley Trust Company of St. Louis, Missouri, to be authenticated by it and delivered to you upon your demand from time to time, and upon the payment to said Mississippi Valley Trust Company of $900 and accrued interest for every $1,000 par value of bonds so delivered, the money so paid by you to be deposited in said Trust Company to the credit of said Washington Northern Railroad Company and to be paid out for the purposes above mentioned on the check of said Railroad Company, countersigned by said Trust Company.

Your agreement to the above proposition to be in-

dicated by your written acceptance endorsed hereon.

OREGON-WASHINGTON TIMBER COMPANY.

By J. E. BLAZIER,
President.

Accepted June 10th, 1910.

LITTLE & HAYS.
By FRANK P. HAYS.

I, E. J. Blazier, secretary of the Oregon-Washington Timber Company, hereby certify that the foregoing is a true and correct copy of the original agreement covering sale of $600,000 first mortgage 5% bonds of said corporation, dated June 4, 1910, and accepted by the firm of Little and Hays, of St. Louis, Missouri, on June 10th, 1910.

In Witness Whereof I have hereunto set my hand and the seal of said corporation at Portland, Oregon, this 21st day of February, 1912.

[Seal] E. J. BLAZIER,
Secretary."

That a syndicate was formed by Little & Hays of St. Louis, Missouri, to purchase said $600,000 first mortgage bonds of the [65] timber company, and that so far as this defendant is advised the following are the members of the syndicate who purchased said bonds, with the amount of their purchases set after their respective names:

J. A. Prescott & Company.....	$200,000
Little & Hays Investment Co.....	200,000
Mr. Hays, brother and relative, about....	50,000
Breckinridge Jones, President Mississippi Valley Trust Company	15,000

Mr. Davis, Vice-President Mississippi Valley Trust Company..	15,000
Eli Klotz, Director Mississippi Valley Trust Company.....	50,000
James Grover, Bond Officer Mississippi Valley Trust Company..	20,000
Mr. Broeck, Director, Treasurer Mississippi Valley Trust Company....	10,000

That a large proportion of said $600,000 first mortgage bonds of the timber company is now held by the members of said syndicate, as above set forth and that all of said parties had knowledge and notice that the proceeds of the sale of said bonds should be applied to the purposes hereinbefore set forth. That the complainants in this section are acting in the capacity of trustees and represent the holders of said bonds and have and can have no higher rights than the bondholders whom they represent and such notice to the bondholders constituted notice to the complainants.

7.

That the proceeds of the sale of the $600,000 first mortgage bonds of the timber company were actually expended as follows:

(1) In the payment of the $150,000 outstanding first mortgage notes of the timber company, which included the cancellation of the $150,000 first mortgage notes of the railroad company, which had priority over the mortgages of the railroad company [66] and the timber company executed to the Mississippi Valley Trust Company.

(2) $175,000 for the payment for timber lands acquired by the Washington-Oregon Timber Company from the Whitney Estate.

(3) About $100,000, as this deefndant believes and charges to be the fact, in building and in buying additional logging equipment for the Oregon-Washington Timber Company.

That at the time of the issuance and sale of said $600,000 first mortgage bonds of the timber company the railroad company was without power under its charter to issue bonds for the purchase of lands for the timber company or for the building of camps and the procuring of logging equipment for the timber company, and this defendant avers and charges the fact to be that the proceeds of the sale of said bonds were paid out by the complainant, the Mississippi Valley Trust Company, upon the direction of the members of the said syndicate, some of whom were officers of said Trust Company, and were paid out by the Trust Company upon the direction of the present holders of the $570,000 first mortgage bonds of the timber company, represented by the complainants in this action; and this defendant avers that the members of said syndicate hereinabove mentioned are now and were at the time of the commencement of this action the holders of more than $300,000 of the $570,000 first mortgage bonds of the timber company sought to be foreclosed in this action, and the complainants, as representatives of the present holders of such bonds, are estopped from sharing in the proceeds of the sale of the bonds of the railroad company or of the property of the railroad company,

to the extent of the $175,000 paid out for timber lands and the $100,000 paid out for the construction of camps and the purchase of logging equipment for the timber company, which sums were at their instance and to their knowledge diverted [67] from the proceeds of the sale of the $600,000 first mortgage bonds of the timber company, and were diverted for the sole and exclusive use and benefit of the Oregon-Washington Timber Company. And this defendant avers that none of the present holders of the $570,000 first mortgage bonds of the timber company ought in equity to be permitted to share either in the proceeds of the sale of the bonds of the railroad company or in the proceeds of the sale of the property of the railroad company, should such a sale be made under the decree of this Court.

8.

That the members of the syndicate above mentioned, whom this defendant avers to be the present holders of more than $300,000 of the first mortgage bonds of the timber company, acquired, as a part of the consideration for the purchase of the $600,000 first mortgage bonds of the timber company, practically all of the stock of the railroad company, amounting to 9993 shares of the par value of $999,300.

9.

That on or about the 16th of February, 1911, the Blazier Timber Company was incorporated under the laws of the State of Oregon, with a capital stock of $200,000. That between the 3d and the 18th day of March, 1911, the stockholders and board of directors

of the Washington Northern Railroad Company, the Oregon-Washington Timber Company and the Blazier Timber Company authorized the execution by the three companies of a series of joint collateral trust notes, to be known as "Series A" and to consist of notes aggregating the principal sum of $100,000; and authorized the execution by the three companies of a series of joint collateral notes to be known as "Series B" and to consist of notes aggregating the principal sum of $150,000. That these notes were [68] described as "First Mortgage and Collateral Notes, Series A" and "Series B," respectively, and were secured:

First. By an indenture dated January 30th, 1911, executed by the two timber companies and the railroad company to the Mississippi Valley Trust Company, by which the Blazier Timber Company conveyed and mortgaged to the trustee all of its property of every kind then owned or thereafter acquired by it, and the railroad company assigned to the trustee the $400,000 second mortgage bonds of the Oregon-Washington Timber Company, together with the $400,000 first mortgage bonds of the railroad company deposited as collateral security for the payment of the second mortgage bonds of said timber company. That the proceeds of the $100,000 "Series A" notes were to be used for the purchase by the Blazier Timber Company of the tract of land known as the "Sibley Tract," and the entire $100,000 of the proceeds of said "Series A" notes, with the exception of $12,783, was used for that purpose.

That the $150,000 "Series B" notes represented

the amount to be paid to the syndicate above named, the present holders of $300,000 of the first mortgage bonds of the Oregon-Washington Timber Company, represented by the complainants in this action, for the stock of the railroad company, which had been sold, as above stated with the first mortgage bonds of said timber company; and said $150,000 Series B'' notes were delivered by the three companies to the said syndicate above named, in payment of the purchase price of the stock of the railroad company which was held and owned by the members of the syndicate. That the stock of the railroad company was not, however, sold to either of the timber companies nor to the railroad company, but was sold to J. E. Blazier. That the purchase price for said stock was paid by the three companies in the form of notes aggregating $150,000, described as ''Series B'' notes, and at the time of the meeting of the stockholders of the railroad company authorizing the issuance [69] of such notes in the sum of $150,000 for such purpose, all of the stock of the railroad company was held and voted by the members of said syndicate, the present holders of the bonds sought to be foreclosed in this action. That until the 3d of May, 1911, a majority of the directors of said railroad company was composed of members of said syndicate, and that the said Hays was president of said railroad company and the said Klotz was secretary thereof at such time.

That such stock of the railroad company was delivered to one J. E. Blazier and ever since has been held and used by his as his individual property.

That the said "Series B" notes for $150,000 were subsequently paid to the members of said syndicate by the railroad company and by the Oregon-Washington Timber Company, or practically the entire sum, as this defendant believes and charges the fact to be.

That the payment of the $150,000 by the railroad company and the Oregon-Washington Timber Company to the said bondholders constituted an unlawful diversion of the funds of the timber companies which at the time of said payment were dominated and controlled by the members of said syndicate; that said $150,000 so paid constitutes an off-set against the holders of the $570,000 of bonds represented by the complaints in this action.

That the payment of said $150,000 is in equity a payment of the bonds being sued upon in this action to the extent of said $150,000, and that the complainants are estopped to enforce their said claims to the extent of $150,000 which sum they have already received from the said railroad company and the said Oregon-Washington Timber Company.

10.

That in order to have a complete accounting for said [70] $150,000 so unlawfully diverted from the Washington Northern Railroad Company and the Oregon-Washington Timber Company to the members of said syndicate, it is necessary, as this defendant is informed and believes, to have the members of said syndicate brought into and made parties defendant in this action, and this defendant prays the Court that an order be entered by this

Court bringing in the members of said syndicate and making them parties to this suit by appropriate action. Or, in the event that said members of said syndicate are beyond the jurisdiction of this Court, that they be denied the right to participate in the proceeds of the sale of the properties of the Washington Northern Railroad Company and of the Oregon-Washington Timber Company.

WHEREFORE, this defendant prays for an order bringing in and making parties to this action the members of the syndicate in this answer named, and for a decree denying to the complainants the relief prayed for in their amended bill of complaint. Or, in the event that such relief prayed for by the complainants be not denied in toto, that such of the bondholders represented by the complainants as had knowledge of and participated in the unlawful diversion of the proceeds of the sale of the $600,000 first mortgage bonds of the Washington Northern Railroad Company be estopped from participating in the proceeds of the sale of the bonds of the railroad company or the properties of the railroad company to the extent of such diversion, as set forth in this answer; and that the sum of $150,000, the amount of the proceeds of the "Series B" notes be off-set against the bonds owned by the members of the syndicate above named, represented by the complainants in this action; and that it be decreed that the complainants and [71] the bondholders and the Oregon Northern Railroad Company have no interest in any portion of the property acquired by the Blazier Timber Company from the Weist

Logging Company, and that, after the allowance of the off-set and estoppel in this answer mentioned, the proceeds of the sale of the property of the railroad company, if it be sold under the order of this Court, be distributed to this defendant as the holder of $400,000 of the first mortgage bonds of the Washington Northern Railroad Company in the proportion that the $400,000 of bonds of this defendant bears to the amount of other outstanding first mortgage bonds of the railroad company that may be established as a valid first lien upon the property of the railroad company. And for such other relief as to this Court may seem meet and equitable.

E. S. McCORD and
J. A. KERR & McCORD,
KERR & McCORD,
Attorneys for Defendant William W. Crawford.

(Verification.)
(Acceptance of service.)
(Filed Jan. 3, 1914.) [72]

[Title of Court and Cause.]

Cross-complaint.

To the Honorable Judges of the Above-entitled Court:

Your orator, William W. Crawford, pursuant to leave of Court first had and obtained, files this, his cross-complaint in the above-entitled action, and for cause of suit [72] against the defendants herein named avers:

I.

That the cross-complainant, William W. Crawford, is now, and at all the times hereinafter mentioned has been, a citizen and resident of the State of Illinois, residing in the city of Chicago therein.

II.

That the Washington Northern Railroad Company is now and at the times hereinafter mentioned has been a corporation organized and existing under and by virtue of the laws of the State of Oregon and is now and at all the times hereinafter mentioned has been a citizen of the State of Oregon.

III.

That the defendant Oregon-Washington Timber Company is now and at all the times hereinafter mentioned has been a corporation organized and existing under and by virtue of the laws of the State of Oregon and is now and at all the times hereinafter mentioned has been a citizen of the State of Oregon.

IV.

That the Blazier Timber Company is now and at all the times hereinafter mentioned has been a corporation organized and existing under and by virtue of the laws of the State of Oregon and is now and at all the times hereinafter mentioned has been a citizen of the State of Oregon.

V.

That the Union Trust Company is now and at all the times hereinafter mentioned has been a corporation organized and existing under and by virtue of the laws of the State of Michigan and is now and at all the times hereinafter mentioned has been a

citizen of the State of Michigan. [74]

VI.

That the Mississippi Valley Trust Company is now and at all the times hereinafter mentioned has been a corporation organized and existing under and by virtue of the laws of the State of Missouri, and is now and at all the times hereinafter mentioned has been a citizen of the State of Missouri.

VII.

That Frank P. Hays and William C. Little, copartners doing business as Little & Hays, ——, Hays, a brother of Frank P. Hays, Breckinridge Jones, Eli Klotz, James Grover, *James Grover*, James E. Broeck, J. E. Blazier, E. J. Blazier, and John E. Prescott and D. L. Robinson, copartners doing business as John A. Prescott & Company, are now and at all the times hereinafter mentioned have been citizens of the State of Missouri and residents therein.

VIII.

That this is a suit between citizens and residents of different States, in which the amount in controversy exceeds, exclusive of interest and costs, the sum of $3,000. That it is also a suit for the foreclosure of liens upon certain property situated in the Western District of Washington and within the Southern Division thereof, which property consists in part of real property, in part of personal property, and in part of easements, servitudes and rights of way on real property, all situate within said district.

IX.

That on the first day of April, A. D. 1912, the said Washington Northern Railroad Company, the Ore-

gon-Washington Timber Company, and the Blazier Timber Company, executed, acknowledged and delivered to this cross-complainant, William W. Crawford, [75] Trustee, a certain mortgage deed of trust, pursuant to a resolution duly and unanimously adopted by all of the stockholders and by the board of trustees of each of said three respective companies at meetings thereof respectively and legally held, wherein and whereby the said Washington Northern Railroad Company, the said Oregon-Washington Timber Company and the said Blazier Timber Company conveyed to the said William W. Crawford, trustee, cross-complainant herein, the following described property, situate in the county of Skamania, State of Washington and within the Southern Division of the Western District of Washington, to wit:

(a) BY THE WASHINGTON NORTHERN RAILROAD COMPANY.

All of the estate, right, title, interest and property of the Railroad Company in and to that certain logging railroad extending from Prindles's Landing in Section 12, Township 1 North, Range 5 East of the Willamette Meridian, and running thence through and over Sections 12, 1, 2, 11, 3 and 2 in said Township 1 North, Range 5 East of said Meridian, and thence through and over Sections 35, 26, and 25, in Township 2 North, Range 5 East of said Meridian, and thence through and over Sections 30 and 19, in Township 2 North, Range 6 East of said Meridian, and thence through and over Sections 24 and 13, in Township 2 North, Range 5 East of said Meridian,

all in Skamania County, in the State of Washington; and all extensions and branches of and additions to said line of railroad, whether in said Skamania County or elsewhere in the State of Washington.

It is understood and hereby declared that the foregoing includes the following real estate and rights of way now owned by the Railroad Company as a part of its said railroad:

All those certain rights of way leases and rights of way in fee in and across certain lands in said Skamania County in the State of Washington, and more specifically described as follows:

Twenty-year lease from April 12, 1909, for railroad across East half Northeast quarter Section 25, Township 2 North, Range 5 East, Willamette Meridian.

Fifteen-year lease from May 16, 1908, for railroad across East half Southeast quarter Section 3, Township 1 North, Range 5 East, Willamtte Meridian.

Fifteen-year lease from May 16, 1908, for railroad across Southwest quarter Section 2, Township 1 North, Range 5 East, Willamette Meridian, and Southwest quarter of Northwest quarter said Section 2.

Fifteen-year lease from April 16, 1908, for railroad across Southeast quarter of Southeast quarter Section 23, Township 2 North, Range 5 East.

Right of way in fee 100 feet wide across West half Northwest quarter Section 25, Township 2 North, Range 5 East, Willamette Meridian. [76]

Railroad right of way over Lot 2, Southeast quarter of Northwest quarter and South half of North-

east quarter Section 19, Township 2 North, Range 6 East, Willamette Meridian.

Fifteen-year lease from June 10, 1910, for railroad across East half Northeast quarter Section 3, Township 1 North, Range 5 East, Willamette Meridian.

Fifteen-year lease from June 9, 1909, for railroad across Southeast quarter Section 26, Township 2 North, Range 5 East, W. M.

Fifteen-year lease from June 13, 1910, for railroad across Southeast quarter Section 26, Township 2 North, Range 5 East, W. M.

Fifteen-year lease from June 3, 1910, for railroad across Northwest quarter Northwest quarter Section 2, Township 1 North, Range 5 East; Southeast quarter Southwest quarter and Northwest quarter Southeast quarter and Southwest quarter Northeast quarter Section 35, Township 2 North, Range 5 East, W. M.

Fifteen-year lease from June 6, 1910, for railroad across East half Northwest quarter Section 35, Township 2 North, Range 5 East, W. M.

Fifteen-year lease from June 3, 1910, for railroad across Northeast quarter Southwest quarter Section 35, Township 2 North, Range 5 East, W. M.

Fifteen-year lease from May 31, 1910, for railroad across Southeast quarter Section 2, Township 1 North, Range 5 East, W. M.

Fifteen-year lease from May 31, 1910, for railroad across all shore and tide lands in front of Lots 1 and 2, Section 12, Township 1 North, Range 5 East, W. M., and a certain portion of Lot 3 of said section, in all a frontage of 71.50 chains along the meander line.

Fifteen-year lease from June 3, 1910, for railroad across North half Northwest quarter Section 11, Township 1 North, Range 5 East, W. M.

Fifteen-year lease from May 31, 1910, for railroad across south half Southwest quarter, Southwest quarter, Southeast quarter, and Lot 1, in Section 1, and Lots 1, 2, 3, and 4, in Section 12, Township 1, Range 5 East, W. M.

Fifteen-year lease from May 31, 1910, for railroad across Northeast quarter Northwest quarter, Northwest quarter Northeast quarter Section 11, Southwest quarter Southwest quarter Section 1 and Lot 1, in Section 12, Township 1 North, Range 5 East, W. M.

Fifteen-year lease from June 3, 1910, for railroad across Northwest quarter Northwest quarter Section 2, Township 1 North, Range 5 East; Southeast quarter Southwest quarter and Northwest quarter Southeast quarter and Southwest quarter Northeast quarter Section 35, Township 2 North, Range 5 East, W. M.

Fifteen-year lease from June 2, 1910, for railroad across Northeast quarter Northwest quarter Section 2, Township 1 North, Range 5 East, W. M.

Fifteen-year lease from June 6, 1910, for railroad across West half Northeast quarter Section 23, Township 2 North, Range 5 East, W. M.

Fifteen-year lease from May 31st, 1910, for railroad across Northeast quarter, Section 26, Township 2 North, Range 5 East, W. M.

Fifty-year lease from June 2, 1910, for railroad across Southwest quarter Northeast quarter, Northwest quarter Southeast quarter, North half South-

west quarter, Section 25, Township 2 North, Range 5 East, W. M.

Fifteen-year lease from June 25, 1908, for railroad across Northwest quarter Northeast quarter Section 35, Township 2 North, Range 5 East, W. M. [77]

Fifteen-year lease from May 16, 1908, for railroad across Southwest quarter Northwest quarter and Southwest quarter Section 2, Township 1 North, Range 5 East, W. M.

Right of way in fee 100 feet wide across West half Northeast quarter and East half Northwest quarter Section 23, Township 2 North, Range 5 East, W. M.

Railroad right of way across Lot 2, Southeast quarter Northwest quarter and South half Northeast quarter Section 19, Township 2 North, Range 6 East, W. M.

Twenty-year lease for railroad across East half Northeast quarter Section 25, Township 2 North, Range 5 East, W. M.

Fifteen-year lease from May 27, 1911, right of way across Northwest quarter Section 17, Township 2 North, Range 6 East, W. M.

All of which leases and grants of rights of way have been filed for record and are duly recorded in the office of the County Auditor of said Skamania County, Washington.

Also that certain tract of land beginning at Northwest corner Northeast quarter Section 35; thence East along the section line between Sections 26 and 35, 10 chains; thence West parallel with center line of Section 35, 10 chains; thence West parallel with the North line of Section 35, 10 chains; thence North

following subdivision line 10 chains to beginning, all in Township No. 2 North, Range 5 East of the Willamette Meridian, in said Skamania County, Washington.

All and singular the rights of way; roadbed and bridges; easements; railway tracks; spurs; side-tracks; switches; sidings; terminals; shops; grounds; depots, stations; power-houses and power machinery; locomotives, tenders, cars, and other rolling-stock and equipment; furniture; tools; and all implements, appendages and appurtenances to or used in connection with said railroad in any manner whatsoever; and all property wheresoever situate now belonging to or in the possession of the Railroad Company, or which shall hereafter be by it acquired, constructed or provided for use as a part of or for use upon or in connection with or by way of additions to or extensions or equipment of said railroad; together with all the reversions, remainders, revenues, rents, income, tolls, fares and profits thereof.

All accounts due or to become due, bonds, mortgages, notes, liens, leases, easements, agreements, maps, surveys, licenses, immunities, rights, privileges, franchises, and grants appertaining to or owned, held, enjoyed or at any time hereafter acquired by the Railroad Company in connection with its said Railroad.

Any and all contracts and agreements with the Timber Company, the Brazier Company, and with any other corporation or corporations, associations, partnerships and individuals for the hauling of logs, cordwood, and other timber products, and of supplies,

materials, goods and merchandise of any and every kind and character, whether such contracts and agreements be now owned or made by the Railroad Company or be at any time hereafter made or acquired by it, together with all rights, interests, claims, moneys, rentals or tolls conferred or granted by or acquired under, or due or to become due upon any or all of such contracts or agreements.

All property of every name and nature now owned or hereafter acquired, or at any time, or from time to time hereafter, by deliverey or by writing of any kind for the purposes hereof, conveyed, pledged, assigned, or transferred by the Railroad [78] Company or any one in its behalf to the trustee, who is hereby authorized at any time and from time to time to receive any property as and for additional security, and also when and as hereinafter provided as substituted security, for the payment of the notes issued hereunder, and according to the terms hereof to hold and to apply any and all such property.

All of the railways, rights of way, tracks, lines, extensions, additions, spurs, sidings, and any and all other property, real, personal and mixed, of every kind and description now owned by the Railroad Company or which, at any time, and from time to time hereafter, shall be purchased, acquired, constructed or provided for use upon or in connection with or as additions to or branches or extensions of the railroad and property now owned by the Railroad Company or otherwise under its present powers or under powers or privileges that may hereafter be confered upon it; and any and all the reversions,

remainders, revenues, rents, profits, tolls or other income of such railroad and of any and all additions to and branches and extensions thereof; together with all and singular the equipment, rights, privileges, immunities and franchises now or hereafter appurtenant thereto or used in connection with the said railway of the Railroad Company or any addition to or branch or extension thereof, whether now constructed or owned or hereafter constructed or acquired by the Railroad Company.

It is the true intent and agreement of the parties hereto that this indenture is to convey all of the property, real, personal and mixed of every kind and wheresoever situated, and all appendages and appurtenances thereto, and all of the equities of redemption, reversions, interests, liens, franchises, rights, privileges, immunities, claims and demands as well in equity as in law, now owned, possessed or enjoyed by the Railroad Company, notwithstanding that the same is not now particularly set forth in this indenture and is not hereinabove specifically described.

It is understood and hereby expressly declared: That the property of the Railroad Company is now subject to the lien of that certain mortgage deed of trust dated June 4, A. D. 1910, executed by the Railroad Company to the Mississippi Valley Trust Company, trustee (a Missouri corporation having its principal office and place of business in the City of St. Louis, in the State of Missouri), and recorded in the office of the County Auditor of Skamania County, Washington, in Book "I" of Mortgages on pages 339 to 356, both inclusive, in order to secure

the payment of the principal of and interest on that certain issue of first mortgage 6% gold bonds of the Railroad Company, being 1000 bonds, numbered from 1 to 1000, both inclusive, and of the denomination of $1,000 each, dated as of June 4, A. D. 1910, and due May 1, A. D. 1928.

That 600 of the aforesaid bonds, being bonds numbered from 1 to 600, both inclusive, have been pledged or assigned as collateral security for that certain issue of first mortgage 6% gold bonds of the Timber Company, aggregating the principal sum of $600,000, issued under and secured by a mortgage deed of trust executed by the Timber Company to the said Mississippi Valley Trust Company, Trustee, under date of June 4, A. D. 1910, which said 600 bonds of the Railroad Company, now held by the said Mississippi Valley Trust Company, trustee, as collateral security as aforesaid, are, by the terms of said mortgage deed of trust of the Timber Company, required to be delivered uncanceled to the Railroad Company upon its demand from time to time, in like amounts and in the order of their corresponding numbers, as the said bonds of the Timber Company are paid. [79]

That 400 of the aforesaid bonds of the Railroad Company, being bonds numbered 601 to 1000, both inclusive, have been pledged or assigned as collateral security for that certain issue of second mortgage 6% bonds of the Timber Company, aggregating the principal sum of $400,000, issued under and secured by a second mortgage deed of trust, executed by the Timber Company to the said Mississippi Valley Trust Company, trustee, under date of June 4, A. D.

1910; which said 400 bonds of the Railroad Company now held by the said Mississippi Valley Trust Company as collateral security as aforesaid, are by the terms of the said second mortgage deed of trust of the Timber Company, required to be delivered uncanceled to the Railroad Company upon its demand from time to time, in like amounts and in the order of their corresponding numbers, as the said second mortgage bonds of the Timber Company are paid;

That the said 400,000 second mortgage bonds of Timber Company were duly issued to and the Railroad Company is now the lawful owner of the same, and is authorized and empowered to use, negotiate, assign, and pledge the same for its corporate purposes;

That the Railroad Company is duly authorized and empowered to issue, use, negotiate, pledge or assign, for its corporate purposes, its said bonds as they are surrendered and delivered to it as aforesaid.

Now, therefore, for the consideration aforesaid, and as a part of the security furnished by the Railroad Company for the payment of the principal of and interest on the notes issued hereunder and secured hereby, the Railroad Company does hereby further sell, assign, pledge, transfer, and set over to the trustee (a) said $400,000 second mortgage bonds of the Timber Company; (b) the said $1,000,000 first mortgage bonds of the Railroad Company as they are from time to time released and delivered, or releaseable and deliverable by the said Mississippi Valley Trust Company under the terms and provisions of the said first and second mortgage deeds of

trust, respectively, of the Timber Company.

(b) BY THE OREGON-WASHINGTON TIMBER COMPANY:

All of the following described lands and real property situated in Skamania County in the State of Washington:

The East half of the Northeast quarter of Section 25; the North half of the North half of Section 24; the East half of the Northeast quarter and the North half of the Southeast quarter of Section 23; the East half and the East half of the West half and the Southwest quarter of the Northwest quarter and the Northwest quarter of the Southwest quarter of Section 14; the whole of Section 13; the East half of Section 11; the Southeast quarter and the Southwest quarter of the Northeast quarter and the Northeast quarter of the Northwest quarter and the West half of the Northwest quarter and the Northwest quarter of the Southwest quarter, and the South half of the Southwest quarter of Section 12; the Southeast quarter of Section 2; and the whole of Section 1; all in Township 2 North, Range 5 East, Willamette Meridian. [80]

The Northwest quarter of Section 30; the Southwest quarter and the North half of the North half and the South half of the North half of Section 19; the whole of Section 18; the Southeast quarter of the Southeast quarter and the Southwest quarter, and the Southwest quarter of the Northwest quarter of Section 7; the Northwest quarter of Section 8; the Southwest quarter of the Southeast quarter and the Southwest quarter, and the Southeast quarter of the

Northwest quarter, and the West half of the Northwest quarter of Section 6; all in Township 2 North, Range 6 East, Willamette Meridian.

The North half of the Northeast quarter, the South half of the Southeast quarter of Section 34; the whole of Section 35; the South half and the Northeast quarter of Section 36; the South half of Section 25; the South half and the Northeast quarter of Section 36; the Southwest quarter, and the Southwest quarter of the Southeast quarter, and the Southwest quarter of the Northwest quarter of Section 26; the Northwest quarter and the North half of the Northeast quarter of Section 24; the Southwest quarter of the Southeast quarter of Section 13; all in Township 3 North, Range 5 East, Willamette Meridian.

The whole of Section 31; the whole of Section 32; the whole of Section 28; the Northwest quarter of Section 29; the Southwest quarter of Section 30; the Southwest quarter of Section 20; the Southeast quarter and the West half of Section 19; the whole of Section 18; the Southwest quarter of Section 17; the Southwest quarter of Section 8, North half and the North half of the South half of Section 31; all in Township 3 North, Range 6 East, Willamette Meridian.

The lands above described embrace in the aggregate about 10,800 acres, upon which there is now standing timber aggregating about three hundred and ninety-seven million feet, as shown by cruises of standard cruisers.

All timber and timber rights, rights of way, easements, railroads, log or logging roads, buildings,

workshops, mills plants, office and store buildings, fixtures, machinery, engines, boilers, rolling stock, teams, logging equipment, now or hereafter located on the real estate hereinabove described or any portion thereof or elsewhere and now owned or hereafter acquired by the Timber Company, together with all the appendages, appurtenances, reversions, remainders, revenues, rents, income, tolls, fares and profits thereof.

And it is expressly agreed that any and all personal property covered by the foregoing description shall be considered as fixtures and appurtenances to and constituting part of the real property of the Timber Company.

All accounts due or to become due, deeds, books, records, bonds, mortgages, notes, liens, leases, easements, agreements, maps, surveys, licenses, immunities, rights, privileges, franchises and grants and all other property and property rights of whatsoever character or nature, real, personal or mixed, and wheresoever situated, now owned, held, possessed or enjoyed by the Timber Company, or any time hereafter acquired by it, and any and all rights or interests therein or thereto; and the reversions, remainders, revenues, rents, income, issues and profits thereof. [81]

Any and all contracts and agreements with the Railroad Company, the Blazier Company and with any other corporation or corporations, associations, partnerships, and individuals in connection with the real estate, timber and timber rights now owned or made by the Timber Company or at any time here-

after, made or acquired by it; together with all moneys, rights, liens, interests, claims, issues, profits, revenues or tolls conferred or granted by or acquired under or due or to become due upon any or all of such contracts or agreements.

All the estate, right, title and interest, property, possession, leases, privileges, franchises, contracts, claims and demands whatsoever as well in equity as at law of the Timber Company and of every part thereof, whether now owned or hereafter acquired by it; and including all property of every name and nature which may at any time and from time to time hereafter by delivery or by writing of any kind for the purposes hereof, be conveyed, pledged, assigned or transferred by the Timber Company or anyone in its behalf to the Trustee, who is hereby authorized at any and all times and from time to time to receive any property as and for additional security and also when and as herein provided as substituted security, for the payment of the notes issued hereunder, and according to the terms hereof to hold and to apply any and all such property.

It is the true intent and agreement of the parties hereto that this indenture is to convey all of the property, real, personal and mixed, of every kind and wheresoever situate, and all appendages and appurtenances thereto, and all of the equities of redemption, reversions, interests, franchises, rights, privileges, immunities, claims and demands, as well in equity as at law, now owned, possessed or enjoyed and which may hereafter be in anywise acquired, owned, possessed or enjoyed by the Timber Company,

notwithstanding that the same is not now particularly set forth in this indenture and is not hereinabove specifically described.

It is understood and hereby expressly declared that the property of the Timber Company is now subject to the lien of two mortgage deeds of trust, viz.:

(a) A first mortgage deed of trust dated June 4, A. D. 1910, executed by the Timber Company to the Mississippi Valley Trust Company, hereinabove mentioned (and recorded in the office of the County Auditor of Skamania County, Washington, in Book "I" of Mortgages, at page 296), to secure the payment of the principal of and interest on that certain issue of 600 first mortgage 6% gold bonds of the Timber Company numbered from 1 to 600, both inclusive, of the denomination of $1000 each, dated June 4, 1910, and maturing serially $30,000 in amount on May 1 and November 1 in each of the years 1912 to 1921, both inclusive; and by and under which mortgage deed of trust the first mortgage bonds of the Railroad Company to the amount of $600,000 face value (being bonds numbered 1 to 600) have been pledged or assigned to the said Mississippi Valley Trust Company, Trustee, as further and collateral security for said first mortgage bonds of the Timber Company, but which said bonds of the Railroad Company are to be surrendered to it from time to time as the said first mortgage bonds of the Timber Company are paid, as hereinabove more fully stated. [82]

(b) A second mortgage deed of trust, dated June 4, A. D. 1910, executed by the Timber Company to the said Mississippi Valley Trust Company (and re-

corded in the office of the County Auditor of Skamania County, Washington, in Book "I" of Mortgages at page 316), to secure the payment of the principal of and interest on that certain issue of 400 second mortgage 6% gold bonds of the Timber Company, numbered from 1 to 400, both inclusive of the denomination of $1000 each, dated June 4, 1910, and maturing serially $30,000 in amount on May 1 and November 1, in each of the years 1922 to 1928, both inclusive; and by and under which mortgage deed of trust the first mortgage bonds of the Railroad Company to the aggregate amount of $400,000 face value (being bonds numbered 601–1000) have been pledged or assigned to the said Mississippi Valley Trust Company, Trustee, as further and collateral security for said second mortgage bonds of the Timber Company, but which said bonds of the Railroad Company are to be surrendered to it from time to time as the said second mortgage bonds of the Timber Company are paid as hereinabove more fully stated.

All of said first mortgage bonds of the Timber Company have been sold and issued and are now outstanding; and all of the said second mortgage bonds of the Timber Company have been duly sold and issued and the Railroad Company is now the lawful owner thereof.

NOW, THEREFORE, for the consideration aforesaid and as a part of the security furnished by the Timber Company for the payment of the principal of and interest on the notes issued hereunder and secured hereby, the Timber Company does hereby

further sell, assign, pledge, transfer and set over to the Trustee all of its right, title and interest in, to and under its aforesaid $400,000 second mortgage bonds, and also said bonds of the Railroad Company as they are from time to time released and delivered, or releaseable and deliverable, under the terms and provisions of said first and second mortgage deeds of trust respectively, of the Timber Company.

(c) BY THE BLAZIER TIMBER COMPANY:

All of the following described lands and real property situated in Skamania County, in the State of Washington:

Lot 1, the East half of the Northwest quarter and the Southwest quarter of the Northeast quarter of Section 7, and the Southwest quarter of Section 8 in Township 2 North, Range 6 East, W. M.

North half of Southwest quarter, Southeast quarter of Southwest quarter Section 9, Township 2 North, Range 6 East, W. M.

Northwest quarter Section 17, Township 2 North, Range 6, East, W. M.

Northeast quarter and West half Southeast quarter 9, Township 2 North, Range 6 East, W. M.

Southeast quarter of Northeast quarter, Northeast quarter of Southeast quarter, West half of Southeast quarter Section 7, Township 2 North, Range 6 East, W. M.

All timber and railroad right-of-way for twenty years on Northeast quarter Section 17, Township 2 North, Range 6 East W. M.

Southwest quarter Section 17, Township 2 North, Range 6 East, W. M. [83]

All timber on Northeast quarter, North half Northwest quarter, Southeast quarter Northwest quarter, and South half Section 16, Township 2 North, Range 6 East, W. M.

Upon the lands above described there is now standing timber aggregating about seventy-nine million feet, as shown by cruises of standard cruisers.

All timber and timber rights, rights of way, easements, railroads, logs, logging roads, buildings, workshops, mills, plants, office and store buildings, fixtures, machinery, engines, boilers, rolling stock, teams, logging equipment, now or hereafter located on the real estate hereinabove described or any portion thereof or elsewhere and now owned or hereafter acquired by the Blazier Company, together with all the appendages, appurtenances, reversions, remainders, revenues, rents, income, tolls, fares and profits thereof.

And it is expressly agreed that any and all personal property covered by the foregoing description shall be considered as fixtures and appurtenances to and constituting part of the real property of the Blazier Company.

All accounts due or to become due, deeds, bonds, books, records, mortgages, notes, liens, leases, easements, agreements, maps, surveys, licenses, immunities, rights, privileges, franchises and grants, and all other property and property rights of whatsoever character or nature, real, personal or mixed and wheresoever situated, now owned, held, possessed or enjoyed by the Blazier Company, or at any time hereafter acquired by it, and any and all rights or inter-

ests therein or thereto; and the reversions, remainders, revenues, rents, income, issues and profits thereof.

Any and all contracts and agreements with the Railroad Company, the Timber Company, and with any other corporation or corporations, associations, partnerships, and individuals in connection with the real estate, timber and timber rights now owned or made by the Blazier Company, or at any time hereafter made or acquired by it; together with all moneys, rights, interests, claims, liens, issues, profits, revenues or tolls conferred or granted by or acquired under or due or to become due upon any or all of such contracts or agreements.

All the estate, right, title and interest, possession, leases, privileges, franchises, contracts, claims and demands whatsoever as well in equity as at law of the Blazier Company and of every part thereof, whether now owned or hereafter acquired by it, and including all property of every name and nature which may at any time and from time to time hereafter by delivery or by writing of an kind for the purposes hereof be conveyed, pledged, assigned or transferred by the Blazier Company or any one in its behalf to the Trustee, who is hereby authorized at any and all times and from time to time to receive any property as and for additional security, and also when and as herein provided as substituted security, for the payment of the notes issued hereunder, and according to the terms hereof to hold and to apply any and all such property.

It is the true intent and agreement of the parties

hereto that this indenture is to convey all of the property, real, personal and mixed, of every kind and wheresoever situate, and all appendages and appurtenances thereto, and all of the equities of redemption, reversions, interests, franchises, rights, privileges, immunities, claims, and demands, as well in equity as at law, now owned, possessed or enjoyed, and which may hereafter [84] be in any wise acquired, owned, possessed or enjoyed by the Blazier Company, notwithstanding that the same is not now particularly set forth in this indenture and is not hereinabove specifically described.

That in and by said mortgage there was also conveyed and transferred to the said William W. Crawford, trustee, in addition to the above-described property, all other property, real, personal and mixed, of every nature and kind whatsoever, which the said three several companies then owned or might thereafter acquire; and it was specifically provided therein that all future acquired property should be deemed to be a part of the security transferred by the said mortgage and as fully embraced within the provisions thereof and subject to the lien created thereby as if the said future acquired property had been owned by the three several companies, or either of them, and had been at the time of the execution of said mortgage deed of trust, and had been specifically described and mentioned in said mortgage deed of trust.

That the said mortgage deed of trust was regularly executed and acknowledged, and being entitled to record was duly recorded on the 9th day of April,

A. D. 1912, in the office of the auditor of Skamania County, Washington, in book "L" at page 68 thereof of the Mortgage Records of Skamania County, Washington, which said mortgage was also filed for record as a chattel mortgage on the 9th day of April, A. D. 1912, in the office of the auditor of Skamania County, Washington in book "O" of Chattel Mortgages at page 344 thereof, of the Chattel Mortgage Records of said Skamania County.

Said mortgage is hereby by reference incorporated in this cross-complaint, and your orator prays leave at any and all times to present said mortgage, or a true copy thereof, for consideration by the Court in further elaboration of your [85] orator's cause of suit thereunder; and said mortgage by reference is hereby made a part of this cross-complaint to the same extent as though the same had been specifically and fully set forth herein.

X.

That the said mortgage described in the preceding paragraph, No. IX of this cross-complaint, was executed to secure an issue of notes in the principal sum of $425,000, known as "First and General Lien 6% Gold Notes" numbered from 1 to 425, inclusive, of the denomination of $1000 each, and maturing at different dates as provided in said mortgage deed of trust; and as contemplated in and by said mortgage deed of trust, there were duly issued four hundred twenty-five First and General Lien 6% Gold Notes, numbered from 1 to 425 consecutively, which bonds were substantially in the following form, duly signed by the President and Secretary respectively of the

Washington Northern Railroad Company, the Oregon-Washington Timber Company, the Blazier Timber Company, and by William W. Crawford, trustee, to wit:

UNITED STATES OF AMERICA.
State of Oregon.
Washington Northern Railroad Company.
Oregon-Washington Timber Company.
Blazier Timber Company.
First and General Lien Six Per Cent Gold Note.

No. ——— $1000.

Washington Northern Railroad Company, Oregon-Washington Timber Company and Blazier Timber Company (hereinafter referred to as the "Companies"), all corporations organized under the laws of the State of Oregon and qualified under the laws of the State of Washington, hereby acknowledge themselves to owe and for value received promise to pay to bearer, or, if registered, to the registered owner hereof the principal sum of ONE THOUSAND DOLLARS on the 1st day of March, A. D. 19—, with interest on said sum from the date hereof until paid at the rate of SIX PER CENT per annum, payable semi-annually on the first days of March and September in each year, as evidenced by and upon the presentation [86] and surrender of the attached interest coupons as they severally mature. Both the interest on and principal of this note are payable in gold coin of the United States of America of or equal to the present standard of weight and fineness, without deduction for any tax or taxes which the Companies or any of them may be required

to pay thereon or retain therefrom under any present or future law of the United States, or of any state, county, municipality or taxing district or authority therein, at the banking house of the Assets Realization Company in the City of Chicago, Cook County, Illinois.

This note is one of a series of 425 notes, numbered consecutively from 1 to 425, both inclusive, of like date, amount and tenor (save as to maturities) issued by the Companies under and in pursuance of and all equally secured by

(a) A certain mortgage trust deed of indenture, dated March 1, A. D. 1912, duly executed by the Companies to William W. Crawford, Trustee, of the City of Chicago, Illinois, conveying, mortgaging, warranting and pledging all of the property of every nature and description, equities of redemption, reversionary interests, contracts, rights and franchises now owned or hereafter acquired by each of the Companies, as set forth in said indenture, and subject to the liens therein mentioned.

(b) A certain collateral trust agreement, dated March 1, A. D. 1912, by and between J. E. Blazier, Eugene Blazier and E. J. Blazier, of the City of Portland, Oregon, and the said William W. Crawford, Trustee, assigning and pledging certain shares of the capital stock of each of the Companies and certain other rights and interests therein mentioned,

To which mortgage deed of trust and collateral trust agreement reference is hereby made for a description of the said property, equities, interests, contracts, rights and stock, the nature and extent of the

security thereby created, the rights and remedies of the holders of said notes under the said indenture and agreement and the provisions for accelerating the maturity of said notes in case of default in the payment of the interest thereon or for other breach of covenant by the Companies under said indenture—all with the same force and effect as if the provisions of said indenture and collateral trust agreement were herein fully set forth.

This note shall pass by delivery unless registered in the holder's name on the books of the Companies at the office of their bond registrar, the said William W. Crawford, Trustee, or his successor in trust for the time being under said indenture, such registry being noted hereon by said registrar. After such registration no transfer hereof shall be valid unless made on such books by the registered owner or by the legal representative of such owner in person, or by duly authorized attorney, and similarly noted hereon; but the same may be discharged from registry by registry to bearer, and thereupon transferability by delivery shall be restored; but from time to time this note may again be registered or transferred to bearer as before. Such registration, however, shall not affect or restrain the negotiability of the interest coupons, which shall continue to be transferable by delivery merely.

This note is redeemable before maturity at the option of the Companies on any interest payment date upon payment by the Companies to the owner hereof, or to the said Assets Realization Company for the benefit of such owner, of the par thereof, together

with a premium of five (5) per centum and all interest then accrued hereon, upon thirty days' previous published notice, as is more fully stated in said indenture. In case of such prepayment, all interest upon the principal hereof shall forthwith cease and any and all obligations for such interest maturing thereafter shall become and shall be null and void. [87]

This note shall not become obligatory for any purpose until it shall have been authenticated by the execution of the certificate hereon endorsed of the said William W. Crawford, Trustee, or of his successor in trust under the said indenture.

IN WITNESS WHEREOF, the said Washington Northern Railroad Company, Oregon-Washington Timber Company and Blazier Timber Company have respectively caused this note to be signed in their names by their Presidents and sealed with their corporate seals attested by their Secretaries, respectively, and each of the interest coupons hereto attached to be executed by the lithographed facsimile signatures of their respective Treasurers the 1st day of March, A. D. 1912.

WASHINGTON NORTHERN RAILROAD COMPANY.

By ————————————,
President.

[Seal] Attest: ————————————,
Secretary.

OREGON–WASHINGTON TIMBER COMPANY.

By ————————————,
President.

[Seal] Attest: ————————————,
Secretary.

BLAZIER TIMBER COMPANY.

By ————————————,
President.

[Seal] Attest: ————————————,
Secretary.

(Form of Trustee's Certificate.)

This is to certify that the within Note is one of the series of four hundred and twenty-five notes numbered one to four hundred and twenty-five issued under and described in the within mentioned mortgage trust deed of indenture.

————————————,
Trustee. [88]

(Form of Guaranty.)

For value received I hereby guarantee the payment of the within note and of each of the interest coupons thereto attached according to the tenor and terms thereof.

————————————.

(Registration.)

Date of Registry.	In Whose Name Registered.	By Whom Registered.

(Form of Coupon.)

No. ———. $30.00

On the first day of ———, A. D. ——, Washington Northern Railroad Company, Oregon-Washington Timber Company, and Blazier Timber Company, will pay to bearer at the banking house of the Assets Realization Company in the City of Chicago, Illinois, thirty ($30.00) dollars, in United States gold coin of or equal to the present standard of weight and fineness without deduction for taxes, being six (6) months' interest then due on their First and General Lien Six Per Cent Gold Note, dated March 1, A. D. 1912, No. ———, unless such note shall previously have been called for redemption.

———————,
Treasurer Washington Northern Railroad Company.

———————,
Treasurer Oregon-Washington Timber Company.

———————,
Treasurer Blazier Timber Company.

That attached to each of said notes was a coupon which entitled the bearer to the payment of $30.00 interest on the first day of March and the first day of September of each year subsequent to the date of said mortgage, it being agreed in [89] and by the

terms of said mortgage that the debt secured thereby should bear six per cent (6%) interest, payable semi-annually on the first day of March and the first day of September of each year, the principal of said notes, however, being payable as follows:

Notes numbered 1 to 30, both inclusive, on September 1, A. D. 1912.

Notes numbered 31 to 60, both inclusive, on March 1, A. D. 1913.

Notes numbered 61 to 95, both inclusive, on September 1, A. D. 1913.

Notes numbered 96 to 130, both inclusive, on March 1, A. D. 1914.

Notes numbered 131 to 170, both inclusive, on September 1, A. D. 1914.

Notes numbered 171 to 215, both inclusive, on March 1, A. D. 1915.

Notes numbered 216 to 265, both inclusive, on September 1, A. D. 1915.

Notes numbered 266 to 315, both inclusive, on March 1, A. D. 1916.

Notes numbered 316 to 370, both inclusive, on September 1, A. D. 1916.

Notes numbered 371 to 425, both inclusive, on March 1, A. D. 1917.

That said notes described in said mortgage were guaranteed by the defendants, J. E. Blazier and E. J. Blazier.

XI.

That in and by the terms of said mortgage trust deed the Washington Northern Railroad Company, the Oregon-Washington Timber Company and the Blazier Timber Company agreed to pay the notes

so issued thereunder and the interest installments thereon as the same matured from time to time, and also covenanted and agreed to pay all the taxes and assessments of all kinds and descriptions which might be assessed, levied or [90] charged against any part of the said security, and in case default should be made in the payment of any interest when due on any note secured by said mortgage and any such default should continue for a period of sixty (60) days, or in the payment of the principal of any note secured thereby when the same should become due and payable, or in the payment of any moneys for the use of the sinking fund provided in said mortgage, for a period of sixty (60) days after the same should become due and payable, or in the due observance and performance of any covenant or condition required by said mortgage to be kept and performed by said companies or any of them and such default should continue for sixty (60) days after written notice thereof to said companies by the said William W. Crawford, trustee, that the said Crawford, as trustee, might declare the principal of all the notes secured by said mortgage then outstanding to be due and payable, and upon such declaration the principal should immediately become due and payable, and that the said trustee having so declared the entire issue of notes to be due and payable might proceed to foreclose said mortgage and to enforce the lien thereof; and upon the commencement of suit should be entitled to the appointment of a receiver for the properties of said companies.

That the Washington Northern Railroad Com-

pany, the Oregon-Washington Timber Company, and the Blazier Timber Company have defaulted in the payment of the interest upon said notes and have defaulted in the payment of the matured notes, and that this cross-complainant, William W. Crawford, as trustee, has declared the entire sum secured by said mortgage immediately due, and has notified said companies; that the said companies have failed to pay the taxes upon the property described in said mortgage and that such default has continued for more than [91] twelve months.

It was further covenanted in said mortgage that upon the foreclosure and sale of the property securing said issue of notes and described in said mortgage, the proceeds of any sale of the trust estate, or any part thereof, together with any other sums held by the trustee as part of the trust estate, should be applied.

First. To the payment of all costs of suit, including all reasonable fees and expenses of the trustee and of any receiver or receivers appointed therein, together with reasonable attorneys' and solicitors' fees, and all costs of advertisement, sale and conveyance.

Second. To the payment of all other expenses of the trust created by said mortgage, including all moneys advanced by the trustee or the holder or holders of any notes for taxes, tax deeds, assessments, abstracts, repairs, mechanics' and other liens and insurance on the trust estate, with interest thereon at the rate of 6% per annum, and of all expenses, liabilities and advances reasonably and prop-

erly incurred by the trustee in managing, maintaining or caring for the trust estate or any part thereof, or in the performing or executing any of his duties or powers therein.

Third. To the pro rata payment of all coupons remaining unpaid and interest thereon at the rate of 6% per annum.

Fourth. To the pro rata payment of the principal of the notes issued under said mortgage and remaining unpaid.

Fifth. To the payment of the overplus, if any, to the Companies jointly or proportionately as they may elect and order, or to whomsoever shall be entitled thereto.

It is further covenanted in said mortgage that pending the foreclosure the said William W. Crawford, as trustee, might at his option take possession of the properties and operate them. [92]

XII.

That the said Oregon-Washington Timber Company, the Washington Northern Railroad Company, and the Blazier Timber Company have failed to pay any part of either principal or interest upon said notes, and that under the provisions of said mortgage, as heretofore stated, the said cross-complainant William W. Crawford, trustee, has declared the entire sum immediately due and payable, and that the whole sum of Four Hundred Twenty-five Thousand Dollars ($425,000) with interest, according to the terms of said mortgage and notes, is now due and unpaid.

XIII.

That on the 4th of June, 1910, the Washington Northern Railroad Company executed to the Mississippi Valley Trust Company, as trustee, a certain mortgage or deed of trust hereinbefore referred to and referred to in the complaint on file in this action, which mortgage is recorded in book "I" at page 339 of the mortgages recorded in the office of the auditor of Skamania County, Washington, to secure an issue of One Million Dollars of bonds.

That on the 4th of June, 1910, the Oregon-Washington Timber Company executed and delivered to the Mississippi Valley Trust Company, as trustee, a mortgage to secure Six Hundred Thousand Dollars of first mortgage bonds, and a second mortgage or trust deed to secure an issue of Four Hundred Thousand Dollars of second mortgage bonds; said first mortgage to secure $600,000 of bonds being recorded in book "I" at page 296 of the mortgage records in the office of the auditor of Skamania County, Washington; and said second mortgage to secure $400,000 of second mortgage bonds being also recorded in book "——" at page —— of the mortgage records in the office of the auditor of Skamania County, Washington, and that reference is [93] hereby made to the said recorded mortgage of the Washington Northern Railroad Company and to the first and second mortgages of the Oregon-Washington Timber Company.

XIV.

That by virtue of the provisions of the mortgage of March 1st, 1912, this cross-complainant as trustee became the owner and holder of $400,000 of the sec-

ond mortgage bonds of the Oregon-Washington Timber Company, together with $400,000 of the first mortgage bonds of the Washington Northern Railroad Company, which were pledged as collateral security for the payment of the said $400,000 of second mortgage bonds of the Oregon-Washington Timber Company, and which were at the time of the execution of the mortgage deed of trust to the Mississippi Valley Trust Company lodged with the Mississippi Valley Trust Company. And this cross-complainant also, by virtue of said mortgage deed of trust, became entitled to the $600,000 first mortgage bonds of the railroad company, held as collateral security by the Mississippi Valley Trust Company for the payment of the $600,000 first mortgage bonds of the Oregon-Washington Timber Company, as such mortgage bonds of the railroad company were from time to time released and delivered, or releaseable and deliverable by the Mississippi Valley Trust Company under the terms and provisions of the first and second mortgages of the timber company, referred to in the amended bill of complaint. And under and by virtue of the provisions of said mortgage deed of trust to this cross-complainant, William W. Crawford, of date March 1, 1912, this cross-complainant acquired a first lien upon all of the property of the Blazier Timber Company, hereinbefore described.

That the property so mortgaged to secure the $425,000 of notes described in the mortgage of March 1st, 1912, is of less value than $425,000, and that such security is wholly inadequate [94] to pay said

notes, or any considerable part thereof, and that this cross-complainant, William W. Crawford, as trustee, will be compelled to rely in large part for the payment of the $425,000 upon the property mortgaged to him by the Washington Northern Railroad Company and the Oregon-Washington Timber Company, and that said William W. Crawford has a vital interest in having the proceeds of the sale of the properties of the Washington Northern Railroad Company and the Oregon-Washington Timber Company applied towards the payment of the $425,000 of notes, in so far as the same are applicable under the terms and provisions of said mortgage deed of trust to the said William W. Crawford, trustee, of March 1, 1912; and is vitally interested in having determined what portion, if any, of the proceeds of the sale of the property of said railroad company and said timber company should be applied towards the payment of the $570,000 first mortgage bonds of the Oregon-Washington Timber Company; and this cross-complainant insists as a matter of law, equity and good conscience that none of the holders of the $570,000 of bonds of the Oregon-Washington Timber Company have any right to or should be entitled to any share in the property or bonds or the proceeds of any sale thereof of said railroad company until they have exhausted all their remedies against the said timber company and its properties.

XV.

That under the provision of the mortgages executed by the Oregon-Washington Timber Company to the Mississippi Valley Trust Company it was pro-

vided that whenever a bond, either first or second, of the said timber company was paid by the said timber company, a bond for the same amount of the Washington Northern Railroad Company was to be returned to the said railroad company, cancelled or uncancelled, at the option of the said railroad company, and the trustee was [95] required to return to the said railroad company such bond upon the payment of one of the said timber company's bonds, and similar provisions were inserted in said mortgages for the surrender of the interest coupons appertaining to the said railroad company's bonds from time to time as the interest coupons appertaining to the said timber company's bonds were paid. And the alleged purchase by the said timber company of the bonds of the said railroad company discloses that it was the intention of the parties to use the bonds of the said railroad company merely as collateral security for the bonds of the said timber company, and that no recourse should be had against the said railroad company, its property or bonds, for the payment of the $600,000 first mortgage bonds of the said timber company unless and until the property of the said timber company had been sold and the proceeds of sale applied to the payment of said timber company's bonds, and then only to the extent of any deficiency.

That the resolutions adopted by the board of directors and stockholders respectively, of the Oregon-Washington Timber Company and of the Washington Northern Railroad Company, and the agreement between the said railroad company and the

said timber company disclose that the proceeds of the $600,000 first mortgage bonds of the timber company, amounting to $540,000, were to be used as follows:

(a) For the retirement of the outstanding mortgage of $150,000 then on the property of the railroad company, which mortgage was pledged as additional collateral to secure the payment of a first mortgage for the same amount, it being understood that the payment of $150,000 should operate as a release of both the $150,000 mortgage of the railroad company and the $150,000 mortgage of the timber company..... $150,000.

(b) For the payment of the floating indebtednesss of the railroad company ..... 125,000.

(c) For extensions, betterments and improvements of the property of the railroad company ..... 215,000.

[96]

(d) Loaned to the timber company by the railroad company ..... $ 50,000,

—all of which is set forth in a certain agreement dated June 4, 1910, executed by the Washington Northern Railroad Company and the Oregon-Washington Timber Company, which said agreement is in words and figures following, to wit:

"SALE OF $1,000,000 WASHINGTON NORTHERN RAILROAD COMPANY 6% BONDS.

Portland, Oregon, June 4, 1910.

Washington Northern Railroad Company,
Portland, Oregon.

Dear Sirs:

We understand that you are proposing to make certain extensions to your railroad (formerly owned by the Cape Horn Railroad Company), the result of which will be to increase our facilities for marketing the timber from our lands in Skamania County, Washington, and that you have authorized an issue of One Million Dollars ($1,000,000) par value first mortgage six per cent gold bonds, dated the 4th day of June, 1910, due on the 1st day of May, 1928, and secured by a first mortgage on your railroad property.

We propose to buy from you the entire issue of One Million Dollars ($1,000,000) par value of said bonds and pay you therefor Four Hundred Thousand Dollars ($400,000) par value of our bonds, as hereinafter described, and the sum of $540,000 in money, said money to be used for the following purposes:

One Hundred and Fifty Thousand Dollars ($150,000) to be used for the present or future payment or retirement of the outstanding first mortgage for $150,000 now on your railroad property, which mortgage is now pledged as additional collateral to secure the payment of a first mortgage for the same amount on our lands and timber in Skamania County, Washington, it being understood that both

of said $150,000 mortgages shall be paid and released by the payment of said $150,000.

One Hundred and Twenty-five Thousand Dollars ($125,000) to be used for the payment of the present floating indebtedness of the Cape Horn Railroad Company.

Two Hundred and Fifteen Thousand Dollars ($215,000) to be used for extensions, betterments and equipment to your railroad property.

Fifty Thousand Dollars ($50,000) to be loaned by you to us on our note for that amount dated the 4th day of June, 1910, due on demand, with interest from its date at the rate of 6% per annum. Said loan and interest to be repaid by us by the payment to you (until said loan and interest are paid) [97] of fifty (50) cents on every thousand (1000) feet board measure of logs taken from our timber lands in Skamania County, Washington, after January 1st, 1911, and we agree to take from said lands and ship over your railroad at least sixty million (60,000,000) feet of logs every year, beginning January 1st, 1911, until all merchantable timber on said lands is exhausted, and upon our failure so to do and to make said payments of fifty cents for every 1000 feet of logs we agree to at once pay said note and interest, or the balance due or to become due thereon in cash. Said payments to be made on or before the 10th day of each month for all logs taken during the previous month.

As a further consideration for the sale to us of the said $1,000,000 of your bonds, and without any new or further consideration, we agree to sell and deliver

to you $400,000 par value 6% of gold bonds issued by us, dated the 4th day of June, 1910, due serially $30,000 par value every six months, beginning May 1st, 1922, the last $40,000 thereof maturing May 1st, 1928, and secured by second mortgage on our lands and timber in Skamania County, Washington, and secured also by $400,000 par value of the $1,000,000 par value now proposed to be purchased by us from you; said $400,000 par value of our bonds so sold to you, however, or the proceeds of the sale thereof to be used by you only for future extensions, betterments or equipment to your railroad, after the expenditure of the said sum of $540,000 above mentioned.

The $1,000,000 par value of your bonds hereby proposed to be purchased by us are all to be executed and delivered by you to the Trustee in the mortgage securing the same, and to be by said Trustee duly authenticated, and the $600,000 par value thereof to be deposited with the Mississippi Valley Trust Company of St. Louis, Missouri, to be by it held in trust as security under the terms of a certain first mortgage dated June 4, 1910, executed by us to said Mississippi Valley Trust Company to secure an issue of $600,000 par value of 6% gold bonds issued by us, and the remaining $400,000 par value of your bonds hereby proposed to be purchased are to be deposited with the said Mississippi Valley Trust Company to be by it held in trust as security under the terms of a certain second mortgage dated June 4, 1910, executed by us to said Trust Company to secure an issue of $400,000 par value second mortgage 6% gold bonds

issued by us, which latter $400,000 par value second mortgage bonds are the bonds hereinabove agreed to be sold and delivered to——

The said sum of $540,000 to be deposited as needed for the purposes mentioned above to your credit at said Mississippi Valley Trust Company and to be paid out in checks signed by you and countersigned by said Trust Company for said purposes.

Your agreement to the above proposition to be indicated by your written acceptance indorsed hereon.

Yours truly,

OREGON-WASHINGTON TIMBER COMPANY.

By J. E. BLAZIER,
President. [98]

ACCEPTED: June 4, 1910.

WASHINGTON NORTHERN RAILROAD COMPANY.

By E. J. BLAZIER,
President.

That the resolutions adopted by the board of directors and stockholders respectively of the Washington Northern Railroad Company and the Oregon-Washington Timber Company as to the above application of the proceeds of the $600,000 of the first mortgage bonds of the timber company by the railroad company and the fact of the foregoing agreement between the said railroad company and the said timber company was well known to the said Mississippi Valley Trust Company at the time of the execution and delivery to it of the $600,000 first mortgage bonds of the said timber company and of

the mortgage securing the same.

XVI.

That on the 4th day of June, 1910, the Oregon-Washington Timber Company entered into an agreement with Frank P. Hays and William C. Little, doing business as Little & Hays of St. Louis, Missiouri, for the sale of the $600,000 first mortgage bonds of the timber company, which said agreement also discloses that the proceeds of the sale of said bonds were to be applied to the purposes stated in the preceding paragraph, and that the proceeds of the sale of said bonds were to be placed to the credit of the Mississippi Valley Trust Company and paid out by the Trust Company upon the check of the railroad company for the purposes above stated, a copy of which agreement is as follows, to wit:

"SALE OF $600,000 OREGON-WASHINGTON TIMBER COMPANY 6% BONDS.

Portland, Oregon, June 4, 1910.

Messrs. Little & Hays,

St. Louis, Missouri.

Gentlemen:

We propose to sell to you our entire issue of $600,000 [99] par value of 6% gold bonds, secured by a first mortgage on our lands and timber in Skamania County, Washington, and secured also by $600,000 par value of gold bonds of the Washington Northern Railroad Company, secured by a first mortgage on its railroad and equipment; and we also propose to include in said sale $999,300 par value of the capital stock of said Washington Northern Railroad Company, all for the sum of $540,000.

Said sum of $540,000 to be used for the benefit of said Washington Northern Railroad Company, which is purposing to extend its railroad through our lands in Skamania County, Washington, thereby increasing our facilities for marketing our timber; and said sum is to be used for the following specific purposes, to wit:

$150,000 to be used for the present or future payment or retirement of the outstanding first mortgage for $150,000 on the property of said Railroad Company, which mortgage is now pledged as additional collateral to secure the payment of a first mortgage of the same amount on our lands and timber in Skamania County, Washington, it being understood that both of said $150,000 first mortgages shall be paid and released by the payment of said $150,000.

$125,000 to be used for the payment of the present floating indebtedness of the Cape Horn Railroad Company.

$215,000 to be used for extensions, betterments and equipments of the Washington Northern Railroad.

$50,000 to be loaned by said Railroad Company to us on our note.

The $600,000 par value of the bonds offered to be sold are to be duly executed by us and deposited with the Mississippi Valley Trust Company of St. Louis, Missouri, to be authenticated by it and delivered to you upon your demand from time to time, and upon the payment to said Mississippi Valley Trust Company of $900 and accrued interest for every $1000 par value of bonds so delivered, the money so paid by you to be deposited in said Trust Company to the

credit of said Washington Northern Railroad Company and to be paid out for the purposes above mentioned on the check of said Railroad Company, countersigned by said Trust Company.

Your agreement to the above proposition to be indicated by your written acceptance endorsed hereon.

OREGON–WASHINGTON TIMBER COMPANY.

By J. E. BLAZIER,
President.

Accepted June 10th, 1910.

LITTLE & HAYS.
By FRANK P. HAYS.

That a syndicate was formed by Little & Hays of St. Louis, Missouri, to purchase said $600,000 first mortgage bonds of the timber company, and that so far as this cross-complainant [100] is advised the following are members of the syndicate who purchased said bonds, with the amount of their purchases set after their respective names:

John A. Prescott & Company, of Kansas City, Missouri.....$200,000
Frank P. Hays and William C. Little, of St. Louis, Missouri, doing business as Little & Hays..... 200,000
—— Hays, brother of the said Frank P. Hays, about..... 50,000
Breckinridge Jones, President Mississippi Valley Trust Company..... 15,000
—— Davis, Vice-president Mississippi Valley Trust Company..... 15,000

Eli Klotz, Director Mississippi Valley Trust Company..... 50,000
James Grover, Bond Officer, Mississippi Valley Trust Company..... 20,000
James E. Broeck, Director, Treasurer Mississippi Valley Trust Company..... 10,000

That a large portion of said $600,000 first mortgage bonds of the timber company is now held by the members of said syndicate, as above set forth, and that all of said parties had knowledge and notice that the proceeds of the sale of said bonds should be applied to the purposes hereinbefore set forth; and in truth and in fact all of the proceedings relative to the issuance of said $600,000 bonds and the execution and delivery of the mortgage securing the same, were directed by said syndicate and by officers and agents of the defendant Mississippi Valley Trust Company. That the Mississippi Valley Trust Company and the Union Trust Company are acting in the capacity of trustees and represent the holders of said bonds and have and can have no higher rights than the bondholders whom they represent, and such notice to the bondholders constituted notice to said Mississippi Valley Trust Company and to said Union Trust Company; and in addition thereto the said Mississippi Valley Trust Company had full and actual knowledge of the facts. [101]

XVII.

That the members of the syndicate above mentioned, whom this cross-complainant avers to be the present holders of more than $300,000 of the first mortgage bonds of the Oregon-Washington Timber

Company, acquired, as a part of the consideration for the purchase of the $600,000 first mortgage bonds of the said timber company, practically all of the stock of the Washington Northern Railroad Company, amounting to 9993 shares of the part value of $999,300.

XVIII.

That on or about the 16th day of February, 1911, the Blazier Timber Company was incorporated under the laws of the State of Oregon, with a capital stock of $200,000.

That between the 3d and the 18th day of March, 1911, the stockholders and board of directors of the Washington Northern Railroad Company, the Oregon-Washington Timber Company, and the Blazier Timber Company, respectively, authorized the execution by the three companies of a series of joint collateral notes, to be known as "Series A" and to consist of notes aggregating the principal sum of $100,000, and authorized the execution by the three companies of a series of joint collateral notes to be known as "Series B" and to consist of notes aggregating the principal sum of $150,000. That these notes were described as "First Mortgage and Collateral Notes, Series A" and "Series B," respectively, and were secured:

First. By an indenture dated January 30th, 1911, executed by the two timber companies and the railroad company to the Mississippi Valley Trust Company, by which the Blazier Timber Company conveyed and mortgaged to the trustee all of its property of every kind then owned or thereafter acquired, by it, and the railroad company assigned to

the trustee the $400,000 second **[102]** mortgage bonds of the Oregon-Washington Timber Company, together with the $400,000 first mortgage bonds of the railroad company deposited as collateral security for the payment of the second mortgage bonds of said timber company. (The option of the aforesaid Little & Hays to purchase the said $400,000 second mortgage bonds of the Oregon-Washington Timber Company, was by them at this time surrendered.) That the proceeds of the $100,000 "Series A" notes were to be used for the purchase by the Blazier Timber Company of the tract of land known as the "Sibley Tract," and in furtherance of a certain hauling contract between said company and the Washington Northern Railroad Company, and the entire $100,000 of the proceeds of said "Series A" notes, with the exception of $12,783, was used for that purpose.

That the $150,000 "Series B" notes represented the amount to be paid to the syndicate above named, the present holders of $300,000 of the first mortgage bonds of the Oregon-Washington Timber Company, represented by the said Mississippi Valley Trust Company and the said Union Trust Company, for the stock of the railroad company, which had been sold—as above stated—with the first mortgage bonds of the said timber company; and said $150,000 "Series B" notes were delivered by the three companies to the said syndicate above named, in payment of the purchase price of the stock of the railroad company which was held and owned by the members of the syndicate. That the stock of the

railroad company was not, however, sold to either of the timber companies, nor to the railroad company, but was sold and delivered to J. E. Blazier individually. That the purchase price of said stock was paid by the three companies in the form or notes aggregating $150,00, described as "Series B" notes, and at the time of the meeting of the stockholders of the railroad company authorizing the issuance of such notes in the sum of $150,000 for such purpose, all of the stock of **[103]** the railroad company was held and voted by the members of said syndicate, the present holders of the bonds sought to be foreclosed in this action. That until the 3d day of May, 1911, a majority of the directors of said railroad company was composed of members of said syndicate, and that the said Hays was president of said railroad company and the said Klotz was secretary thereof at such time.

That such stock of the railroad company was delivered to one J. E. Blazier and ever since has been held and used by him as his individual property.

That the amount of said "Series B" notes for $150,000, or, as this cross-complainant is informed and believes and so charges, practically said amount, was subsequently paid to the members of said syndicate, the holders thereof, at their instance and with their connivance, by the Washington Northern Railroad Company and the Blazier Timber Company.

That the execution, delivery and payment of the said $150,000 "Series B" notes to the said persons constituted an unlawful diversion of the funds of

the said companies, which at the time of said payment were dominated and controlled by the members of said syndicate; that said $150,000 so paid constitutes an offset against the holders of the $570,000 of bonds represented by the said Mississippi Valley Trust Company and the said Union Trust Company.

That the payment of the said $150,000 is in equity a payment of the bonds sought to be enforced in this action to the extent of said $150,000, and that the complainants are estopped to enforce their said claims to the extent of $150,000, which sum they have already received from said railroad company and the said timber company. **[104]**

XIX.

This cross-complainant further alleges that $400,000 of the second mortgage bonds of the Oregon-Washington Timber Company and $400,000 of the first mortgage bonds of the Washington Northern Railroad Company, numbered from 601 to 1000, both inclusive, and $30,000 first mortgage bonds of said railroad company, numbered from 1 to 30, both inclusive, have been issued, sold, assigned, transferred and pledged to him; and alleges that said bonds are entitled to participate with the $570,000 bonds of the Washington Northern Railroad Company, numbered from 31 to 600, both inclusive, and in the proceeds of the sale of the property covered by said mortgage of said railroad company to the Mississippi Valley Trust Company; and further alleges that he not only claims the right to enforce said $430,000 first mortgage bonds of the Washing-

ton Northern Railroad as of equal dignity to the $570,000 first mortgage bonds of said railroad company, represented by the complainants in this action, but he claims he is entitled to prior right to participate in the proceeds of the sale of the property of the railroad company over said $570,000 as against such holders of the aforesaid first mortgage bonds of the said Oregon-Washington Timber Company as are estopped or precluded from participating in the proceeds of the sale of the property of said railroad company as hereinbefore more fully set forth.

This cross-complainant further alleges that all of the property of the Blazier Timber Company, including the property acquired from the Weist Logging Company, referred to in the complaint, is subject to his mortgage and that his mortgage or deed of trust constitutes a first lien upon all of said property of whatsoever nature or kind owned by the Blazier Timber Company. **[105]**

That the complainants and defendants in this action claim some interest in the property covered by this cross-complainant's mortgage, but that such interests or claims are inferior and subordinate to the claims of this cross-complainant.

XX.

That is was provided in the mortgage given by the Washington Northern Railroad Company, the Oregon-Washington Timber Company, and the Blazier Timber Company to this cross-complainan*y* that at any foreclosure sale of the properties covered by said mortgage, the note holders secured

thereby might bid at said sale and pay their bids in part by their endorsement on their bonds of such credits as such bonds be entitled to from the purchase price of the properties sold at such sale or sales.

XXI.

That your orator has no plain, speedy or adequate remedy at law. That all of the facts and circumstances herein set forth are true and entitle your orator to relief at the hands of a court of equity.

WHEREFORE, your orator, this cross-complainant, William W. Crawford, trustee, brings this his cross-bill and prays:

1. For a judgment against the Oregon-Washington Timber Company, the Washington Northern Railroad Company, and the Blazier Timber Company, and J. E. Blazier and E. J. Blazier for the sum of Four Hundred Twenty-five Thousand Dollars ($425,000) with interest as provided in the notes set forth in the mortgage deed of trust; and for a decree of this Court establishing the said sum as a valid first lien upon all of the property described in his mortgage trust deed pledged or mortgaged by the Blazier Timber Company; and establishing his ownership of and title to $430,000 of the first mortgage bonds of the Washington **[106]** Northern Railroad Company, described in this cross-complaint and adjudicating such bonds to be of equal rank with the $570,000 of first mortgage bonds of the railroad company represented by the complainants herein, except such portion of said $570,000 as

are owned by the defendants Frank P. Hays and William C. Little, copartners doing business as Little & Hays; —— Hays; Breckinridge Jones; Eli Klotz; James Grover; James E. Broeck; J. E. Blazier, E. J. Blazier, and John A. Prescott and D. L. Robinson, copartners doing business as John A. Prescott & Company, and establishing such bonds as superior to the bonds held by such last-named parties, and establishing his title to and ownership of, in and to the $400,000 of second mortgage bonds of the Oregon-Washington Timber Company; and for a decree foreclosing his said mortgage and directing the sale of the properties described therein; and for a decree barring and enjoining the defendants Frank P. Hays, William C. Little, —— Hays, Breckinridge Jones, Eli Klotz, James Grover, James E. Broeck, J. E. Blazier, E. J. Blazier, John A. Prescott and D. L. Robinson from participating in the proceeds of the sale of the properties covered by the first mortgage of the Oregon-Washington Timber Company and the second mortgage of the Oregon-Washington Timber Company, and the first mortgage of the Washington Northern Railroad Company, in the event that this Court permits the foreclosure of such mortgages in accordance with the prayer of the complainants in their amended bill of complaint, and establishing the right of this cross-complainant to participate in the proceeds of the sale of the properties of the Washington Northern Railroad Company on an equal basis with the holders of the first mortgage bonds of the railroad company who are not estopped by the decree of this

Court from participating therein.

And in the event that the Court decrees the foreclosure [107] of cross-complainant's mortgage, or the complainants' mortgages or any of them, that the rights of the parties to this suit may be determined by decree and the funds arising from said sale may be distributed in accordance with the rights and equities of the respective parties, and that such hearings may be had as shall suffice to advise the Court thoroughly with reference to the rights of all the parties to this suit and the rights of all the bondholders secured by said mortgages.

Your orator further prays that in and by said decree it may be provided that any bondholder secured by said mortgages may bid at the said sale and may pay such portions of their bids as their bonds shall be entitled to under the said decree by endorsement of said amounts upon their bonds. That the amounts due under all of said mortgages may be determined and fixed by said decree; and that your orator may be awarded in and by said decree a reasonable and suitable sum for his services in administering said trust and that he may likewise be awarded a reasonable sum for the services of his attorneys and that he may be allowed for all disbursements by him made; and that he may be granted such other and further relief as shall be meet and equitable in the premises.

KERR & McCORD,
Attorneys for Cross-complainant.

(Verified.)
(Filed June 8, 1914.) [108]

[Title of Court and Cause.]

Answer to Cross-complaint.

To the Honorable the Judges of the Above-entitled Court:

The Mississippi Valley Trust Company and Union Trust Company, trustees and complainants in the above suit in chief, having been made defendants to the cross-bill of William W. Crawford, for answer thereto admit, deny and aver as follows:

I.

Admit the allegations of paragraph I of the cross-bill. **[109]**

II.

Admit the allegations of paragraph II.

III.

Admit the allegations of paragraph III.

IV.

Admit the allegations of paragraph IV.

V.

Admit the allegations of paragraph V.

VI.

Admit the allegations of paragraph VI.

VII.

Admit the allegations of paragraph VIII.

VIII.

Admit the allegations of paragraph IX.

IX.

Admit the allegations of paragraph X.

X.

These complainants in the cause in chief and defendants to the cross-bill are without knowledge as

to whether or not the Washington Northern Railroad Company, the Oregon-Washington Timber Company, and the Blazier Timber Company, or either thereof, have defaulted in the payment of interest upon the notes described in the cross-bill and as to whether they, or either of them, have defaulted in the payment of the matured notes, and as to whether the cross-complainant has declared the entire sum secured by his mortgage due or as to the length of time that the said alleged default has continued.

XI.

These complainants and defendants to the cross-bill are wholly without knowledge as to whether the Oregon-Washington Timber Company, the Washington Northern Railroad Company, and the Blazier Timber Company, or either thereof, have failed to pay the principal and interest on the notes of the cross-complainant, [110] or as to whether the cross-complainant has declared the entire debt due, or as to whether the entire debt is now due.

XII.

These defendants to the cross-bill admit the allegations of paragraph XIII thereof.

XIII.

These defendants to the cross-bill deny that by reason of the matters in the cross-bill alleged, or otherwise, the cross-complainant as trustee, or otherwise, became the owner or holder of $400,000 of the second mortgage bonds of the Oregon-Washington Timber Company, or any thereof, or $400,000 of the first mortgage bonds of the Washington

Northern Railroad Company, or any thereof. These defendants to the cross-bill admit that the cross-complainant is entitled to the bonds of the Washington Northern Railroad Company as such bonds are from time to time released and delivered, or releasable and deliverable, by the Mississippi Valley Trust Company under the terms and provisions of the first and second mortgages of the Oregon-Washington Timber Company, referred to in the amended bill of complaint, and these defendants to the cross-bill admit that the cross-complainant acquired a first lien on the property of the Blazier Timber Company, and these defendants admit that the property of the Blazier Timber Company is inadequate to pay the mortgage debt asserted by the cross-complainant, and that it is to the interest of the cross-complainant that a part of the proceeds of the sale of the properties of the Washington Northern Railroad Company and the Oregon-Washington Timber Company be applied to the payment of his debt, but these defendants to the cross-bill deny that the cross-complainant is entitled to have any of the said properties sold for the payment of the debt of the cross-complainant, or to have the proceeds of the sale of the said properties applied to the debt of the cross-complainant until the debt asserted in the amended bill of complaint has been [111] paid and satisfied in full, and these defendants to the cross-bill deny that these defendants should have no right to the proceeds of the sale of the property of the Washington Northern Railroad Company until they have exhausted all other remedies against the

Oregon-Washington Timber Company, and these defendants deny each and every other allegation not heretofore admitted in the 14th paragraph of the said cross-bill.

XIV.

These defendants to the cross-bill admit that the mortgages executed by the Oregon-Washington Timber Company to the Mississippi Valley Trust Company on the 4th of June, 1910, contained the provision recited in the 15th paragraph of the cross-bill, but these defendants to the cross-bill deny that the purchase by the Oregon-Washington Timber Company of the bonds of the Washington Northern Railroad Company discloses that it was the intention of the parties to use the bonds of the said railroad company merely as collateral security for the bonds of the timber company, or that no recourse should be had against the railroad company, or its property or bonds, for the payment of the $600,000 first mortgage bonds of the said timber company unless or until the property of the said timber company had been sold and the proceeds of the sale thereof applied to the payment of the said timber company bonds, and these defendants to the cross-bill deny that the properties of the railroad company when sold should be applicable only to the payment to these defendants to the cross-bill of any deficiency remaining in their debt after payment to it of the proceeds of the timber company properties. These defendants to the cross-bill deny each and every allegation remaining in the 15th paragraph of the cross-bill and not stricken out by the Court, except as hereinbefore specifically admitted.

XV.

These defendants to the cross-bill deny the allegations [112] contained in the 19th paragraph thereof, and deny specifically that $400,000 of second mortgage bonds of the Oregon-Washington Timber Company, or any thereof, and that $400,000 of the first mortgage bonds of the Washington Northern Railroad Company, numbered from 601 to 1000 inclusive, or any thereof, or $30,000 first mortgage bonds of the said railroad company, numbered from 1 to 30 inclusive, or any thereof, have been issued, sold, assigned, transferred, or pledged to cross-complainant, and deny that the said bonds, or any thereof, are entitled to participate with the $570,000 of bonds of the Washington Northern Railroad Company numbered from 31 to 600 inclusive, or in the proceeds of the sale of the property covered by the said mortgage of the said railroad company to the Mississippi Valley Trust Company. These defendants to the cross-bill admit that the cross-complainant makes the claims set forth in the 19th paragraph of the cross-bill, but they deny that the said claims are meritorious or just or legal, or that the cross-complainant is entitled to the matters and things claimed by him.

These defendants to the cross-bill admit that the property of the Blazier Timber Company is subject to the lien of the mortgage of cross-complainant, but they deny that the property acquired from the Wiest Logging Company is subject to such lien.

These defendants to the cross-bill admit that they claim an interest in the property acquired from the Wiest Logging Company, and admit that they claim

a prior and first lien on the property described in the complaint.

XVI.

These defendants to the cross-bill admit the allegations of paragraph XX thereof.

XVII.

These defendants to the cross-bill deny each and every allegation contained in the 21st paragraph thereof, except that [113] these defendants admit that the remedy, if any, of the defendant Crawford is in equity.

WHEREFORE, having fully answered these defendants to the cross-bill pray that they may be hence dismissed with their costs and disbursements.

SNOW & McCAMANT,
HUFFER & HAYDEN,
Solicitors for Mississippi Valley Trust Company and Union Trust Company.

(Verification.)

(Acceptance of service.)

(Filed July 2, 1914.) [114]

Reply.

Come now the complainants and for their reply to the first further and affirmative defense contained in the answer of the defendant William W. Crawford, trustee:

I.

Complainants deny that the amended bill of complaint shows on its face, or otherwise, that two separate causes of action have been improperly united in said amended bill of complaint, or that the said

amended bill of complaint is multifarious in the respect pointed out in paragraph I of the said separate answer, or otherwise, and complainants deny that there is a misjoinder of causes of action in the said amended bill of complaint.

II.

Complainants deny that there is a misjoinder of parties plaintiff in the respect pointed out in paragraph II of the said affirmative answer, or otherwise.

III.

Complainants deny that there is a misjoinder of parties defendant in the respect pointed out in paragraph III of the said affirmative answer, or otherwise.

IV.

Complainants admit that the amended bill shows that the Mississippi Valley Trust Company holds $570,000 of the bonds of the Washington Northern Railroad Company as collateral security for the payment of the $600,000 bonds issued by the Oregon-Washington Timber Company, and that the amended bill discloses an attempt to foreclose the two mortgages given by two different parties in this suit, but [115] complainants deny that the said matters are two distinct subject matters, and deny that the causes of action arising therein are not joint and deny that the liability asserted against the Oregon-Washington Timber Company is distinct, separate, or different from the liability asserted against the defendant, the Washington Northern Railroad Company, and deny that sufficient grounds are not shown in the

said amended bill for uniting the matters comprehended therein in order to promote the convenient administration of justice and in this behalf complainants aver that the said mortgages are in effect two mortgages for the security of the same debt.

For reply to the second affirmative answer of the defendant William W. Crawford, trustee, complainants admit the allegations of paragraph I of the said second affirmative answer.

II.

Complainants admit the allegations of paragraph II thereof.

III.

Complainants admit the allegations of paragraph III thereof.

IV.

Complainants deny that by virtue of the matters and things averred in the said affirmative answer, or otherwise, the defendant William W. Crawford as trustee became the owner and holder of $400,000 of the first mortgage bonds of the Washington Northern Railroad Company, or any bonds thereof. Complainants admit that the defendant William W. Crawford became entitled to $600,000 of the first mortgage bonds of the Washington Northern Railroad Company as the said bonds are from time to time released and delivered, or releasable and [116] deliverable, by the Mississippi Valley Trust Company under the terms and provisions of the first and second mortgages of the Oregon-Washington Timber Company, but only after the payment to complainants of the debt averred in the amended bill.

Complainants admit that by the mortgage deed of trust referred to in the answer the defendant William W. Crawford acquired a first lien upon all of the property of the Blazier Timber Company, and complainants admit that the property of the Blazier Timber Company so pledged to the defendant Crawford is of less value than $425,000, and that the said security is inadequate to pay obligations aggregating $425,000, but complainants deny that the said security is inadequate to pay a considerable part of the said $425,000 referred to in the said answer. Complainants are not advised as to the value of the property of the Blazier Timber Company and ask that the defendant Crawford make his proof thereof. Complainants admit that the said defendant will be compelled to rely in part upon the property mortgaged to him by the Oregon-Washington Timber Company and the Washington Northern Railroad Company and that the said defendant has a vital interest in having the proceeds of sale of the properties of the Washington Northern Railroad Company and the Oregon-Washington Timber Company applied toward the payment of the defendant Crawford's debt in so far as the said proceeds are applicable, and admits that the said defendant Crawford is vitally interested in having determined what portion of the proceeds of the sale of the said properties should be applied toward the payment of the $570,000 first mortgage bonds of the Oregon-Washington Timber Company. Complainants deny that as a matter of law, equity, or good conscience, or otherwise, none of the holders of the $570,000 bonds of the Oregon-

Washington Timber Company have [117] any right or should be entitled to any share in the property or bonds or proceeds of any sale thereof, or of the properties of the Washington Northern Railroad Company until they have exhausted all or any of their remedies against the Oregon-Washington Timber Company or its property.

V.

Complainants admit that under the provisions of the mortgage executed by the Oregon-Washington Timber Company to the Mississippi Valley Trust Company it was provided that whenever a bond, either first or second, of the said timber company was paid by the said timber company, a bond for the same amount of the Washington Northern Railroad Company was to be returned to the said railroad company, canceled or uncanceled, at the option of said railroad company, and admit the trustee was required to return to the said railroad company in such case such bond upon the payment of one of the timber company's bonds, and complainants admit that similar provisions were inserted in said mortgages for the surrender of the interest coupons appertaining to the said railroad company's bonds from time to time as the interest coupons appertaining to the said timber company's bonds were paid. Complainants admit that the purchase by the Oregon-Washington Timber Company of the bonds of the Washington Northern Railroad Company discloses that it was the intention of the parties to use the bonds of the Washington Northern Railroad Company as collateral security for the bonds of the Oregon-Wash-

ington Timber Company, but complainants deny that such use was the only use contemplated or that the said bonds were to be used merely or only for such purpose. Complainants deny that it was a part of the said agreement, or that it is the law, or [118] that it is equitable or just that no recourse should be had against the Washington Northern Railroad Company, its property or bonds for the payment of the $600,000 first mortgage bonds of the said Oregon-Washington Timber Company unless, or until the property of the said Oregon-Washington Timber Company has been sold, or the proceeds of the sale of the same have been applied to the payment of the said timber company's bonds, or that recourse should be had to the security in any event only to the extent of a deficiency.

FOR A FURTHER AND AFFIRMATIVE REPLY to the answer of the defendant William W. Crawford, trustee, complainants aver:

I.

That although the mortgage of the defendant William W. Crawford, as alleged in his second affirmative answer, is in the sum of $425,000, that the moneys advanced thereon and thereunder were $300,000 and no more.

II.

That the defendant William W. Crawford, trustee, took the mortgages referred to in his second affirmative answer, and the notes and bonds secured thereby, and advanced the sum of $300,000 thereon with full knowledge and notice of the rights of complainants and of the bondholders for whom complain-

ants are trustees. That the said defendant, at, and prior to the time of taking the said mortgages, notes, and bonds and making the advances aforesaid, was sufficiently advised of all of the transactions had between complainants and the defendants Washington Northern Railroad Company and Oregon-Washington Timber Company.

III.

That the defendant William W. Crawford ought not to be heard to say that he is entitled to participate in the [119] proceeds of the sale of the properties of the Washington Northern Railroad Company as the holder of any bonds thereof for the following reasons, to wit:

On or about the 4th day of June, 1910, an agreement was entered into between the defendant, the Washington Northern Railroad Company, and the defendant Oregon-Washington Timber Company, wherein and whereby it was agreed on sufficient consideration that $400,000 of the bonds of the Washington Northern Railroad Company should be sold and disposed of on the express agreement, understanding and condition that the proceeds of such sale should be used wholly for the construction of extensions, betterments, and equipment of the defendant, the Washington Northern Railroad Company. That the defendant William W. Crawford, trustee, was well advised of the agreement between the said defendants aforesaid. That under the terms and conditions of the mortgages recited in the amended bill of complaint complainants had an interest in the said agreement between the said defendant mortgagors

for as much as after-acquired property of the said defendants was a part of the security pledged to complainants. That the advances made under the mortgage of the defendant William W. Crawford, trustee, were not used for the construction of extensions, or betterments on the railroad of the Washington Northern Railroad Company, nor were the said moneys used for the purchase of equipment for the said railroad of the Washington Northern Railroad Company, nor were the said advances made with intent that they should be used for either or any of the said purposes. That all of the said $400,000 of bonds of the Washington Northern Railroad Company now claimed by the defendant William W. Crawford, trustee, were acquired [120] and became the property of the Washington Northern Railroad Company subsequent to the execution of the mortgage of Washington Northern Railroad Company to Mississippi Valley Trust Company and thereupon became subject to the lien of said mortgage. That the defendant William W. Crawford, trustee, cannot become entitled to the said bonds, or to any of the bonds of the Washington Northern Railroad Company, until after the said bonds have become the property of the said Washington Northern Railroad Company and until after the same have been paid, and that the rights of the said William W. Crawford, trustee, in and to the said bonds are subject and subsequent to the rights of complainants, as set forth in the bill of complaint, and to the rights of the owners of the bonds amounting to $570.000, in the bill of complaint averred.

WHEREFORE, complainants pray as in their amended bill of complaint.

HUFFER and HAYDEN,
SNOW and McCAMANT,
Solicitors for Complainants.

(Verified.)
(Affidavit of service.)
(Filed Apr. 9, 1914.) [121]

Motion to Dismiss.

Comes now the defendant William W. Crawford, trustee, and moves the Court for an order dismissing the bill of complaint filed herein, upon the following grounds and for the following reasons:

I.

That the bill of complaint shows upon its face that two separate causes of action have been improperly united in the complaint:

(a) An action by the Mississippi Valley Trust Company to foreclose a mortgage or deed of trust executed by the Washington Northern Railroad Company to Mississippi Valley Trust Company, trustee, to secure an issuance of bonds in the aggregate amount of $1,000,000.

(b) An action by the Mississippi Valley Trust Company and the Union Trust Company, trustees, to foreclose a certain mortgage or deed of trust executed by Oregon-Washington Timber Company, a corporation, to Mississippi Valley Trust Company and Union Trust Company, trustees, to secure an issuance of bonds of the Oregon-Washington Timber Company in the aggregate amount of $1,000,000, consisting of $600,000 first mortgage bonds and $400,000

second mortgage bonds.

That there has been a misjoinder of causes of action in said complaint.

II.

That there is a misjoinder of parties plaintiff, in that the Mississippi Valley Trust Company, trustee under the mortgage of the Washington Northern Railroad Company is joined as a complainant with the Mississippi Valley Trust Company and [122] Union Trust Company, trustees under the mortgage executed by the Oregon-Washington Timber Company.

III.

That there has been in the bill of complaint a misjoinder of parties defendant in that the Washington Northern Railroad Company, which executed the deed of trust upon the property of the railroad company to secure an issuance of bonds by the railroad company, as above stated, is joined as a defendant with the Oregon-Washington Timber Company, which executed a mortgage to the Mississippi Valley Trust Company and the Union Trust Company, trustees, to secure an issuance of bonds by the Oregon-Washington Timber Company.

IV.

That the bill of complaint discloses upon its face that the Mississippi Valley Trust Company holds $600,000 of the bonds of the Washington Northern Railroad Company as collateral security for the payment of the bonds issued by the Oregon-Washington Timber Company, and the bill of complaint discloses an attempt to foreclose two separate mortgages executed by different parties to different parties, in-

volving two distinct subject matters, in one action.

V.

That there is more than one complainant and the causes of action so attempted to be joined are not joint, and the liability asserted against the Oregon-Washington Timber Company is distinct, separate and different from the liability asserted against the defendant Washington Northern Railroad Company, and sufficient grounds are not shown for uniting the causes of action in order to promote the convenient administration of justice. [123]

VI.

That the bill of complaint does not constitute a valid cause of action in equity against the defendants.

Should the Court refuse the motion to dismiss the complaint, this defendant, William W. Crawford, trustee, moves the Court to require the complainants to elect whether the foreclosure of the mortgage of the Washington Northern Railroad Company shall proceed, or whether the foreclosure of the mortgage of the Oregon-Washington Timber Company shall proceed, and in the event of such election to strike from the bill of complaint all allegations touching the foreclosure of the mortgage that the complainants do not elect to proceed with.

W. W. CRAWFORD,
Trustee.
By KERR & McCORD,
His Solicitors.
E. S. McCORD and
J. A. KERR,
Solicitors for William W. Crawford, Trustee.

(Filed Nov. 15, 1913.) [124]

Order (Denying Motion to Dismiss and Allowing an Amended Bill to be Filed).

This cause coming on to be heard on this 1st day of December, 1913, complainants appearing by Wallace McCamant of their solicitors, and the defendant William W. Crawford, trustee, appearing by Messrs. Kerr & McCord, his solicitors.

IT IS ORDERED by the Court on application of counsel for complainants that the bill of complaint be amended by interlineation in that the word "railroad" be substituted for the word "timber" on the 24th page of the bill, where the same occurs in the 3d, the 11th, and the 16th typewritten lines, being identical with the 4th, the 13th, and the 18th numbered lines.

The motion of the defendant Crawford to dismiss the bill on the ground of the improper joinder of two causes of suit, and on the ground that the bill does not constitute a valid cause of action in equity, having been argued and submitted to the Court, said motion is by consideration of the Court denied and the defendant Crawford is allowed an exception to the order of Court denying the same.

Complainants on their application are allowed ten (10) days from this date within which to serve and file an amended bill, and the defendant Crawford is allowed twenty (20) days from the service of such amended bill within which to answer the same.

Dated December 3d, 1913.

EDWARD E. CUSHMAN,
Judge.

(Filed Dec. 3, 1913.) [125]

Amended Motion (to Strike from Answer of Crawford).

Come now complainants, Mississippi Valley Trust Company and Union Trust Company, and for their amended motion to strike out move the Court to strike out:

I.

Paragraph V of the said affirmative answer except the following portion thereof which is not moved against:

> "That under the provisions of the mortgages executed by the Oregon-Washington Timber Company to the Mississippi Valley Trust Company it was provided that whenever a bond, either first or second, of the timber company was paid by the timber company, a bond for the same amount of the Washington Northern Railroad Company was to be returned to the railroad company, cancelled or uncancelled, at the option of the railroad company, and the trustee was required to return to the railroad company such bond upon the payment of one of the timber company's bonds, and similar provisions were inserted in said mortgages for the surrender of the interest coupons appertaining to the railroad company's bonds from time to time as the interest coupons appertaining to the timber company's bonds were paid. And the alleged purchase by the timber company of the bonds of the railroad company discloses that it was the intention of the parties to use the bonds of the rail-

road company merely as collateral security for the bonds of the timber company."

II.

Paragraph VI of the said affirmative answer.

III.

Paragraph VII of the said affirmative answer.

Complainants move the Court to strike out each and every of the portions so moved against and the allegations by way of setoff and counterclaim contained therein on the following grounds, to wit:

(a) That the matters pleaded in the said portions of the answer of the said defendant are not germane to this suit and not proper to be litigated herein.

(b) That the matters set up in the portions of [126] the answer moved against could not under any circumstance form the basis of a suit in equity brought by the defendant William W. Crawford against the complainants, or either of them.

(c) That the matter so moved against, and each and every portion thereof, consists of irrelevant and redundant matter wholly immaterial.

(d) That the defendant, William W. Crawford, cannot be heard to litigate the matters so moved against on the ground that he took his mortgage subject to the lien of the mortgage given by the Washington Northern Railroad Company to Mississippi Valley Trust Company, as appears from paragraph II of his answer, and subject to the mortgage given by the Oregon-Washington Timber Company to Mississippi Valley Trust Company, and now held by complainants, as appears by paragraph III of the said affirmative answer; and for the further reason that

the setoff or counterclaim undertaken to be set up in his answer is available only to the Washington Northern Railroad Company; and for the further reason that the rights of the defendant, William W. Crawford, attach subsequent to the transactions complained of.

Complainants also move the Court to strike out:

I.

The eighth paragraph of the said answer.

II.

The ninth paragraph of the said answer.

III.

The tenth paragraph of the said answer.

Complainants move the Court to strike out the said portions so moved against, and each and every portion thereof, and the defense by way of setoff and counterclaim undertaken [127] to be pleaded by the defendant, William W. Crawford, therein, on the following grounds, to wit:

(a) That the matter so moved against by complainants, and each and every portion thereof, is irrelevant, redundant, and immaterial.

(b) That the matter so moved against, and every portion thereof, is not germane to this suit and improper to be litigated herein.

(c) That the matter moved against, and every portion thereof, is insufficient and inadequate to constitute the subject matter of an independent suit in equity by the defendant, William W. Crawford, against the complainants, or either of them.

(d) That the matter moved against if available to anyone is available only to Washington Northern Railroad Company.

(e) That the defendant, William W. Crawford, cannot be heard to set up the matters and things so moved against for the reason that his answer wholly fails to show that at the time when the transactions complained of took place the said William W. Crawford had any rights whatever in the premises, and for the further reason that the mortgage of the defendant, William W. Crawford, was expressly taken subject to the mortgage given by the Washington Northern Railroad Company to Mississippi Valley Trust Company, as appears from paragraph II of the affirmative answer of the said defendant, and subject to the mortgage given by the Oregon-Washington Timber Company to Mississippi Valley Trust Company, and now held by complainants, as appears from paragraph III of the said answer. [128]

(f) The claim by way of setoff undertaken to be alleged in the portion of the answer so moved against is cognizable at law and not in equity, and there is no allegation of insolvency of the parties responsible for the misuser of funds of the Washington Northern Railroad Company.

F. A. HUFFER,
HUFFER & HAYDEN, and
SNOW & McCAMANT,
Solicitors for Complainants.

(Acceptance of service.)
(Filed March 4, 1914.) [129]

Order (to Strike from Answer of Crawford).

This cause came on regularly for hearing on the 9th day of March, 1914, upon the motion of complain-

ants to strike from the amended answer of the defendant, W. W. Crawford, trustee, certain portions thereof, complainants appearing by Messrs. Snow & McCamant and Huffer & Hayden, their solicitors, and the defendant, W. W. Crawford, trustee, appearing by his solicitors, Messrs. Kerr & McCord, and the Court having on said day heard the argument of counsel and taken said motion under advisement and now being fully advised in the premises.

IT IS ORDERED that the following portions of the amended answer of the said defendant, W. W. Crawford, trustee, be and the same are hereby stricken from said amended answer, to wit:

All that portion of paragraph V of the second affirmative answer of the said defendant contained in his amended answer from the beginning of the second line on the thirty-ninth page to the conclusion of the said paragraph, the portion hereby stricken beginning with the line reading as follows: "That the resolutions adopted by the Board of" and ending with the end of the fifth paragraph.

Also all of paragraphs six (6), seven (7), eight (8), nine (9) and ten (10) of the second affirmaitve defense of said amended answer,

to which order and ruling the defendant, W. W. Crawford, trustee, excepts and his exception is allowed.

Done in open court this 31st day of March, 1914.

EDWARD E. CUSHMAN,
Judge. **[130]**

(Filed Mar. 31, 1914.)

Motion (to Strike from Cross-complaint of Crawford).

Come now the Mississippi Valley Trust Company and Union Trust Company, complainants in the original case, and pursuant to permission granted by order of Court made and entered on the 8th day of June, 1914, move the Court to strike out the following portions of the cross-complaint of William W. Crawford, to wit:

I.

Paragraph VII of the cross-bill.

II.

All that portion of paragraph XV beginning on line nineteen of page twenty-four with the words "that the resolution adopted," down to and including the end of the said paragraph.

III.

Paragraph XVI of the said cross-bill.

IV.

Paragraph XVII of the said cross-bill.

V.

Paragraph XVIII of the said cross-bill.

The original complainants aforesaid move the Court to strike out each and every of the portions so moved against, and the allegations by way of setoff and counterclaim contained therein, on the following grounds, to wit:

(a) That the matters pleaded in the said portions of the cross-bill are not germane to this suit, and not proper to be litigated herein.

(b) That the matters set up in the portions of

the cross-bill moved against could not under any circumstances form the basis of a suit in equity brought by William W. Crawford against [131] the Mississippi Valley Trust Company and the Union Trust Company, or either of them.

(c) That the matters so moved against, and each and every portion thereof, consist of irrelevant and redundant matter wholly immaterial.

(d) That William W. Crawford cannot be heard to litigate the matters so moved against on the ground that he took his mortgage subject to the lien of the mortgage given by Washington Northern Railroad Company to Mississippi Valley Trust Company, and subject to the mortgage given by Oregon-Washington Timber Company to Mississippi Valley Trust Company, and now held by these complainants as will fully appear from paragraph IX of the said cross-bill.

(e) That William W. Crawford cannot be heard to litigate the matters so moved against for the reason that the matters therein set up, if proper to be litigated at all, are available only to the Washington Northern Railroad Company, and not to the said William W. Crawford.

(f) That the matters undertaken to be litigated in and by the portions of the cross-bill moved against are not available to the said William W. Crawford for the reason that his rights, if any, did not attach until subsequent to the transactions complained of.

(g) The claim undertaken to be set up in the portions of the answer moved against is cognizable at law and not in equity, and the cross-bill contained

no allegation of the insolvency of the parties mentioned in paragraph VII of the said cross-bill.

SNOW & McCAMANT,
HUFFER & HAYDEN,
Solicitors for Mississippi Valley Trust Company and Union Trust Company.

(Filed June 18, 1914.) [132]

[Title of Court and Cause.]

Order (to Strike from Cross-complaint of Crawford.)

This cause coming on to be heard on the motion of Mississippi Valley Trust Company and Union Trust Company to strike out portions of the cross-bill of William W. Crawford, the said moving parties appearing by Wallace McCamant of their solicitors, and the said William W. Crawford appearing by E. S. McCord of its solicitors, and the Court being now fully advised thereon: [133]

IT IS CONSIDERED, ORDERED AND ADJUDGED that the said motion be and it is hereby allowed, and that the following portions of the said cross-bill be and they are hereby stricken out.

I.

Paragraph VII of the cross-bill.

II.

All that portion of paragraph XV beginning on line nineteen of page twenty-four with the words "that the resolutions adopted," down to and including the end of the said paragraph.

III.

Paragraph XVI of the said cross-bill.

IV.

Paragraph XVII of the said cross-bill.

V.

Paragraph XVIII of the said cross-bill.

VI.

The said William W. Crawford is allowed an exception to the ruling of the Court.

EDWARD E. CUSHMAN,
Judge.

(Filed June 18, 1914.) [134]

[Title of Court and Cause.]

Memorandum of Decision, Filed February 13, 1915.

CUSHMAN, District Judge.

A re-examination of the question in issue convinces me of the correctness of the former ruling herein on the motion to strike. (212 Fed. 776.) It is not deemed necessary to again state at length the transactions concerning the various mortgages and bond issues involved.

It is not necessary to determine whether the $400,000 of the railroad bonds, as acquired by the timber company before their sale by it to the railroad company, as collateral to the timber company's bonds, also sold, were of equal rank with the $600,000, sold and delivered by the trustee. Nor is it necessary to determine, when the $400,000 of the railroad company's [135] bonds were transferred by the timber company to the railroad company, whether that transaction will be considered as tantamount to their payment and concellation, or—while subject to reissue—as affecting a reduction in

their rank, rendering them subject to the $600,000 of bonds so sold and delivered.

The reason that it is not necessary to determine these questions is that the mortgage of the railroad company to the Mississippi Valley Trust Company, originally securing them, provided that it should cover all after acquired property:

> "This grant is intended to include and shall include all of the franchises, contracts, rights of way, easements, privileges, traffic agreements, rolling stock, cars and engines now owned by said Company or which may hereafter be acquired by it; and also all rents, incomes, tolls and profits accruing and to accrue from its said business.
>
> "It is the intention of these presents and it is hereby agreed, that all future acquired property, real or personal or mixed, including all future extensions, improvements or betterments of the property hereafter acquired by said Company, shall be as fully embraced within the provisions hereof, and subject to the lien hereby created for securing payment of all of said bonds, together with interest thereon, as if the said property were now owned by said Company and were specifically mentioned herein.
>
> "Also all real property, timber and timber rights, and rolling stock of the Railroad Company of every kind and description now owned or hereafter acquired and wherever situate, and all lands, tenements, hereditaments, buildings,

structures, warehouses, workshops, mills, plants and fixtures; all machinery, engines and boilers, all documents, deeds, timber contracts and leases, maps, surveys, inventories and papers relating to the real estate and timber rights and contracts conveyed hereby, now owned or hereafter acquired; and all rents, issues, and profits, earnings, and income from the property hereby conveyed; it being the intention hereby to convey, and said Railroad Company does hereby convey, transfer and asisgn, all property of the above kind, nature and description, which it now owns and all which it may hereafter own or acquire in any manner."

This language sufficiently shows an intention to include such after acquired property as these bonds coming to the railroad company from the timber company. In the very nature of the case, the exact description of property, which, **[136]** in the course of events, will be acquired by a mortgagor, cannot be foreseen and it would be unreasonable to require such a degree of prescience as would be necessary to enable the parties to such a mortgage to exactly describe it in advance of its acquirement.

But whether this would be a rule justified in all cases, in the present case it is clearly so, for, on the same date that the railroad mortgage was given, and as a part of the same, general transaction, it was agreed that the $400,000 of railroad bonds should be transferred to the timber company and retransferred by the timber company to the railroad company as collateral security for a like amount of

bonds of the timber company. In such agreement it is expressly recited that this retransfer is to be made

> "as a further consideration or the sale to us (that is the Timber Company) of said One Million Dollars ($1,000,000) par value of your (the Railroad Company's) bonds and without any new or further consideration. * * * "

From this it appears that the railroad company obtained this $400,000 of its own bonds back as part consideration for the entire issue. They were, therefore, property coming to it as direct proceeds from the sale of its bonds and it must, ordinarily, be presumed that after acquired property purchased by the bonds themselves is to be covered by the mortgage, where language such as occurs in this instance is used. At any rate, a clear expression of an intention to the contrary would be required to warrant a ruling otherwise.

If it was the intention that these $400,000 of railroad bonds should pass under the Crawford mortgage, free from the lien of the first mortgage, no good reason appears why **[137]** they were not withdrawn from the custody of the Mississippi Valley Trust Company and delivered to the trustee under the Crawford mortgage when the latter was executed.

It has been recognized that there is a stronger presumption, where a railroad or like corporation is concerned, that its property is intended to pass as a

whole, than in the case of an ordinary mortgagor.

Jones on Mortgages, vol. 1, sec. 167;

Jones on Corporate Bonds, etc., secs. 95, 96 and 97.

Not only is the intention shown in this first mortgage to cover such after acquired property, but an intention is also shown in the Crawford mortgage to recognize the facts that the prior mortgage does cover and include such property and that the latter —the Crawford mortgage—shall be subject to the other in such particular.

The following appears in that mortgage, but is is not the only recital warranting a like construction:

> " * * * the Railroad Company does hereby further sell, assign, pledge, transfer and set over to the Trustee (a) said $400,000 second mortgage bonds of the Timber Company; (b) *the said $1,000,000 first mortgage bonds of the Railroad Company as they are from time to time released and delivered, or releaseable and deliverable,* by the said Mississippi Valley Trust Company under the terms and provisions of the said first and second mortgage deeds of trust, respectively, of the Timber Company. * * * " * * * it is hereby expressly declared that the lien of this indenture *on the properties* of the Timber Company and the Railroad Company is subject to the lien of those two certain first and second mortgage deeds of trust executed by the Timber Company and of that certain mortgage deed of trust executed by the Railroad Company to the Mississippi Valley Trust Company, Trustee, as herein-

before set forth, *as to all the property covered by and to the extent* stated in said respective mortgage deeds of trust; and all property mortgaged or pledged to the said Mississippi Valley Trust Company, Trustee, under said mortgage deeds of trust, *and any and all such shares of stock, bonds, notes, or other obligations or securities* **[138]** *delivered* to said Trustee under or pursuant to or in connection with said mortgage deeds of trust, shall, be held, subject only to the prior lien thereof, subject to the lien and charge of this indenture for the security of the notes issued hereunder—all with the same force and effect as if the said property, shares of stock, bonds, notes and other obligations and securities had been and were specifically included and described in the granting and pledging clauses of this indenture." (The italics are the Court's.)

There are no equities in the present case which would qualify, in any way, this conclusion; nor any reason why this interpretation, placed upon the mortgage and recognized by the subsequent mortgagee, should not obtain.

From whatever point the question is viewed, an intent is shown to make the security given for the Crawford mortgage upon the $400,000 of the million issue of the first mortgage bonds of the railroad company subject to the $600,000 sold and delivered by the Trustee.

The property referred to as the "Weist Logging Equipment" clearly passed to the Blazier Timber

Company, freed from any claim by the railroad company. The title to this property was never in the railroad company so as to render it subject to the after acquired property clause of the mortgage, and, if it were, it was, of course, taken subject to the right of recovery and forfeiture by the lessor.

27 CYC., pp. 1141 (e) and 1142.

No other reasonable conclusion can be reached than that the railroad company agreed with the lessor of the property and the Blazier Timber Company to turn the property over to the latter company, without a formal forfeiture by the lessor. The intimate relation existing between the railroad company and the Blazier Timber Company and its officers strengthens this conclusion and, under all the circumstances, **[139]** it would be inequitable to rule otherwise.

The mortgage of the Oregon-Washington Timber Company to the Mississippi Valley Trust Company contains the following:

> "Also all real property, lands, timber and timber rights and rolling stock of the Timber Company of every kind and description now owned or hereafter acquired, and wherever situate. * * * "

This language is sufficient to cover and include the after acquired timber lands of that company.

A reasonable attorney's fee to be allowed complainants is found to be 5% of the total amount found due for principal and interest upon entry of decree. Twenty-five Hundred Dollars is found to be a reasonable attorney's fee for William Crawford, cross-complainant.

Decree may be prepared in accordance with the foregoing. **[140]**

[Title of Court and Cause.]

Final Decree.

This cause having come on for final hearing upon the evidence taken by the respective parties, and the case having been duly argued and submitted by Messrs Wallace McCamant and Edward C. Wright on behalf of complainants, Mr. F. A. Huffer also appearing for complainants, and the cause having been argued and submitted on behalf of the defendant William W. Crawford, Trustee, by Mr. E. S. McCord, of his solicitors, a decree *pro confesso* having heretofore and more than thirty days prior to this date, been entered as to the defendants Washington Northern Railroad Company, Oregon-Washington Timber Company, and Blazier Timber Company;

IT IS NOW CONSIDERED, ADJUDGED AND DECREED that:

Complainant Mississippi Valley Trust Company is a corporation organized under the laws of the State of Missouri, with authority to take and administer the trust of the mortgages to it as trustee as hereinafter found and decreed, and at the time of the execution of the mortgages it was, and is now authorized to take and administer in the State of Washington the trust imposed by the said mortgages, and the complainant Union Trust Company at the time of the creation of the trust in it, and the naming of it as a cotrustee with the Mississippi Val-

ley Trust Company, as hereinafter found and decreed, was, and is, a corporation organized under the laws of the State of Michigan, with authority to take and administer in connection with the complainant Mississippi Valley Trust Company, the trust imposed by the mortgage of the defendant Oregon-Washington Timber Company of June 4, 1910, hereinafter found and decreed, and at the time of the naming of the said cotrustee it was, and is now, authorized to take and administer in the State of Washington the trusts imposed by the said mortgage of June 4, 1910. **[141]**

The defendants Washington Northern Railroad Company, Oregon-Washington Timber Company, and Blazier Timber Company at the time of the execution of the mortgages by said respective companies executed, hereinafter found and determined, were, and each is, a corporation organized under the laws of the State of Oregon and each was authorized at the time of the execution of the mortgages referred to, and is now authorized to transact business in the State of Washington, each having prior to the execution of the mortgages complied with the laws of the State of Washington for the transaction of business therein by foreign corporations, each having filed with the Secretary of State of the State of Washington a certified copy of its Articles of Incorporation and named a state agent therein, and each having paid its license fees for the transaction of business therein.

The defendant William W. Crawford, trustee, is a natural person and at the time of the execution of

the mortgage in his favor, hereinafter found and decreed, and at the time of the filing of the complainant's bill herein, was, and he is, a citizen and resident of the State of Illinois, residing in the city of Chicago therein.

Each of the parties to this cause has appeared herein by the respective solicitors of each who have filed in the course of the proceedings taken in the cause various pleadings and papers in behalf of the respective parties hereto.

Heretofore, and on June 4, 1910, the defendant railroad company executed and delivered to complainant Mississippi Valley Trust Company, as trustee, its certain deed of mortgage conveying and transferring to the trustee thereunder certain properties hereinafter described, and the same having been so executed as to entitle it to record, the same was on June 10, 1910, duly recorded in the office of the auditor of Skamania County, Washington, wherein the properties therein described were situated, in book "I" of Mortgages, pages 339 to 356, both inclusive; said mortgage was executed to secure 1000 bonds, numbered from 1 to 1000, both inclusive, and of the denomination of $1000 each, dated as of June 4, 1910, and maturing on May 1st, 1928, 600 of the bonds, numbered 1 to 600, both inclusive, being by the railroad company duly negotiated and deposited with the Mississippi Valley Trust Company, as trustee, by way of collateral to a mortgage bond issue of the Oregon-Washington Timber Company of June 4, 1910, hereinafter found and determined, and 400 of the said bonds, numbered 601 to 1000, inclusive, were duly negotiated

to the Oregon-Washington Timber Company and by it duly assigned to the railroad company as collateral under a second mortgage bond issue by the timber company, as hereinafter found and determined. That the debt evidenced by the second mortgage bonds of the timber company has not been paid. That the interest of the railroad company in the said 400 railroad bonds immediately on its acquiring of the same became subject to the lien of the 600 railroad bonds then outstanding, and the said 400 railroad bonds could be, and were in fact, reissued by the railroad company only as inferior in dignity and subsequent in time of payment to the 600 bonds first negotiated and then outstanding. By the terms of the said bonds of the said railroad company and of the mortgage to secure the same, it was provided, among other things, that the railroad company should well and truly pay all of the said bonds, principal and interest, and pay and discharge all taxes and assessments which might be levied against any of the mortgaged property, including personal taxes which might be levied against itself, and should pay all premiums which might be exacted for any insurance upon any of the mortgaged property, and any and all taxes which might be levied or assessed against any of the bonds, or the holders thereof, for account of the said bonds, and it was likewise provided by the mortgage that if at any time default should be made by the railroad company in [142] the payment of any of its said bonds, taxes or like character of charges by the mortgage imposed upon said railroad com-

pany, and such default should continue for a peroid of thirty days after written notice by the trustee to pay the same, that then the trustee, in its discretion, might declare the principal of all of said bonds then outstanding at once due and payable, together with the accrued and unpaid interest thereon, and that thereupon the whole of the principal of said bonds, including the accrued and unpaid interest thereon, should at once become due and payable, anything in the terms of said bonds to the contrary notwithstanding; as likewise was it provided in and by the said mortgage that upon any foreclosure being made of the mortgaged premises, the principal of all bonds secured by the mortgage, if not already due and payable, should at once become due and payable, whether or not notice had been given declaring the principal due by reason of any default, anything in the bonds or in the said mortgage contained to the contrary notwithstanding, and it is now found and decreed that the said railroad company has defaulted in the payment of the interest upon the said bonds due by the terms thereof November 1, 1912, May 1, 1913, and has defaulted in all interest due upon the said bonds since the 1st day of November, 1912.

And on September 3, 1913, demand was duly made in writing, in accordance with the said mortgage, upon the railroad company for the payment of the several sums of money as to which it had defaulted in payment prior to said date, and that thereupon the complainants have declared the entire debt, principal and interest of the said mortgage

indebtedness, due and collectible.

By the terms of the said mortgage likewise, and of the first mortgage of June 4, 1910, of the Oregon-Washington Timber Company, hereinafter found and decreed, it was provided that in the event of a foreclosure the mortgaged property, described in each of said mortgages might be sold as an entirety, and it is now found and determined by the Court that the best interests of all parties interested in the said mortgages require that the property described therein should be sold as an entirety,

There is now due under said mortgage and mortgage bonds issued thereunder by said railroad company $970,000 and interest at 6% per annum from May 1, 1912.

And on June 4, 1910, the Oregon-Washington Timber Company executed and delivered to the Mississippi Valley Trust Company, as trustee, its certain mortgage deed of trust conveying to the said Trust Company the properties hereinafter described as the properties of said Timber Company, which mortgage being so executed as to entitle it to record, was thereafter and on June 10, 1910, duly recorded in the office of the Auditor of Skamania County, Washington, in which county the said properties were situate, in book "I" of Mortgages, beginning at page 296, which said mortgage was executed to secure a bonded indebtedness by the said timber company determined to be issued in the aggregate sum of $600,000, represented by bonds number from 1 to 600, both inclusive, of the denomination of $1,000 each, the bonds being dated June 4,

1910, and maturing thereafter serially, the last of which bonds would by its terms become due November 1st, 1921, and the said bonds representing the said bonded indebtedness were by the said Timber Company duly negotiated, sold and delivered. **[143]** By the terms of each of the said mortgages of the railroad company and the timber company, and by the terms of the said bonds issued thereunder, the said mortgage indebtedness drew interest at six per cent per annum from May 1, 1910, payable semi-annually on the first day of May and the first day of November of each year, and to each of the mortgage bonds issued under the same interest coupons were attached representing the interest to be paid thereon and all of the said bonds and interest coupons were by the terms thereof made payable in United States gold coin, and each of the said mortgages and of the bonds and bonded indebtedness to secure which the mortgages were executed were duly authorized by the unanimous vote of the stockholders of the respective corporatioons issuing the same and of the directors of said corporations, and the properties described therein and intended by the said mortgages to be described, were and are situate in Skamania County, Washington, and are hereinafter described.

By the terms of the said timber company mortgage it was, among other things, provided that the trustee thereunder might appoint a cotrustee by designating such cotrustee in writing and filing the written notice of such designation with the secretary of the timber company, and that when such

appointment should be made the trustee so named should be vested jointly with the said Mississippi Valley Trust Company with all title to the properties and assets conveyed and intended to be conveyed thereby as security, with all powers, duties and franchises described in the said mortgage deed, and on the 19th day of May, 1911, said Mississippi Valley Trust Company did in writing designate and appoint the co-complainant herein, Union Trust Company, a cotrustee under said mortgage, and the said instrument making such appointment was duly filed with the secretary of the timber company and was duly recorded in the Records of Deeds of Skamania County, Washington, in book "H" at page 178, on May 31, 1911, and at all times since May 19, 1911, the powers, duties, titles and franchises created by the said mortgage of the timber company have been held and exercised jointly by the two complainants herein, Mississippi Valley Trust Company and Union Trust Company. It was provided by said timber company mortgage likewise, and among other things, that from and after the 1st day of May, 1911, certain amounts of timber upon the lands of said defendant timber company (and the lands conveyed by the said mortgage were essentially timber lands) should be cut annually by the mortgagor company and that there should be paid into the hands of the trustee annually $90,000 by way of sinking fund for the redemption of the mortgage indebtedness; that the timber company should regularly pay all taxes and lawful assessments which might be assessed or levied against the

property covered by the mortgage, and that a failure to pay the same should be deemed to be a default under the terms of the mortgage; that the mortgagor company should pay the several bonds and interest coupons as the same should mature under the mortgage, and that if default should be made by the timber company in the payment of interest as the same might mature, or in the payment of the sinking fund annually, as provided by the mortgage, or default be made in the payment of taxes and assessments against the properties, and if such default should continue for sixty days after written notice by the trustee, addressed to the timber company at its principal office, specifying the default complained of and demanding that the timber company perform its covenants, then that the Trustee, in its discretion, might declare the principal of all bonds then outstanding at once due and payable, together with all accrued and unpaid interest thereon; and it is now found that $30,000 of the said mortgage indebtedness maturing May 1, 1912, and being [144] respectively for the bonds numbered 1 to 30, both inclusive, has been paid, together with the interest coupon due on said date, and all interest accruing thereon prior to said date, but that the timber company has failed and neglected to pay any sums toward the sinking fund provided for by the mortgage, except the sum of $4,500 hereinafter found; has failed to pay the interest due on the principal debt on November 1, 1912, and May 1, 1913, and has failed to pay any interest maturing since

May 1, 1912, and likewise the taxes accruing thereon after the year 1911, and on September 3, 1913, demand was duly made in writing in accordance with the provisions of said mortgage, as hereinafter set out, upon the timber company for the payment of the several sums of money as to which it had defaulted in payment prior to the said date, and thereupon the complainants have declared the entire debt due, being the principal annd interest of the said mortgage indebtedness.

It was provided by the mortgage likewise that upon any foreclosure being made of the mortgaged premises under the mortgage that the principal of all bonds secured thereby and then outstanding, if not already due and payable, should at once become due and payable, whether or not notice had been given declaring the principal due by reason of the default, anything in the bonds or mortgage contained to the contrary notwithstanding.

By the terms of the said timber company mortgage likewise it was provided that as fast as any principal bonds issued thereunder and the interest thereon was paid, a like amount of the bonds and of the interest coupons thereto attached of the railroad company should be surrendered to the railroad company, and it is now declared that payment having been made of bonds numbered 1 to 30, both inclusive, secured by the timber company mortgage and the interest coupons thereof, a like amount of bonds and coupons of the railroad company were in fact surrendered to the railroad company by the complainants, trustees.

It was provided likewise by the said mortgage of the timber company that defaults being made and continued as aforesaid the trustee might proceed to foreclose the said mortgage. And there is now due thereon the sum of $570,000 and interest thereon at 6% per annum from May 1, 1912.

Thereafter and on June 4, 1910, likewise said the Oregon-Washington Timber Company executed a second mortgage to the Mississippi Valley Trust Company as trustee, of all and singular the property described in its first mortgage of June 4th, 1910, and of all and singular its ownership, right and title to $400,000 par value of the six per cent first mortgage gold bonds of the Washington Northern Railroad Company, dated June 4th, 1910, and which by the terms of the said mortgage matured May 1, 1928. Said second mortgage likewise provided, and the second mortgage bonds issued thereunder so provided, that the mortgage debt should draw interest at six per cent per annum, payable semiannually, and by the terms of the mortgage security and of the bonds issued thereunder the bonds so issued were numbered from 1 to 400, both inclusive and matured serially, first maturity thereof beginning on May 1, 1922, and terminating May 1, 1928; and second mortgage bonds secured by said mortgage were negotiated by the timber company and delivered to the Washington Northern Railroad Company, and for the said second mortgage bonds of the timber company, aggregating $400,000 and for considerations [145] running from the said timber company to the railroad company said first mortgage bonds of the railroad com-

pany of June 4, 1910, were issued, negotiated and delivered to the said timber company.

In the contract for the purchase and sale of said second mortgage bonds it was provided:

> "As a further consideration for the sale to us of said One Million Dollars ($1,000,000) par value of your bonds and without any new or further consideration, we agree to sell and deliver to you Four Hundred Thousand Dollars ($400,000) par value six per cent (6%) gold bonds issued by us dated the first day of May, 1910, due serially Thirty Thousand Dollars ($30,000) par value every six months, beginning May 1st, 1922, and ending May 1st, 1928, and secured by second mortgage on our lands and timber in Skamania County, Washington, and secured also by Four Hundred Thousand Dollars par value of the One Million Dollars par value of bonds now proposed to be purchased by us from you; said $400,000 par value of our bonds so sold to you, however, or the proceeds of the sale thereof, to be used by you only for future extensions, betterments, or equipment to your railroad after the expenditure of the said sum of Five Hundred and Forty Thousand Dollars above mentioned."

That the second mortgage bonds of the Timber Company and the 400 railroad bonds collateral thereto were not used for future extensions, betterments or equipments for the railroad, but the interest of the Washington Northern Railroad Company therein was assigned and transferred, as hereinafter set forth, to the defendant William W. Crawford,

Trustee, subject, however, to the paramount lien and interest of the holders of the 600 railroad bonds aforesaid.

It was provided by the said second mortgage likewise that the Timber Company would and should pay all taxes, of any and every nature and kind, levied upon its property mortgaged, and that from and after the date when it had agreed to make, or had made its last payment on account of the sinking fund provided for in its first mortgage of June 4, 1910, to secure its issue of first mortgage six per cent gold bonds, it would so long as anything remained due on the said mortgage cut and remove a sufficient amount of logs so that during each twelve months period $45,000 of the proceeds derived from the sale of the said logs should be paid in as a sinking fund to redeem and discharge its said second mortgage bonds. And said mortgage being so executed as to entitle it to record, the same was duly recorded in the office of the Auditor of Skamania County, Washington, where the properties described in the mortgage were situated, in Book "I" of Mortgages, page 316 et seq.

The property described and conveyed and intended to be conveyed by the Railroad Company's first mortgage hereinbefore found, is as follows:

"That certain logging railroad extending from Prindle's Landing in Section 12, Township 1 North, Range 5 East of the Willamette Meridian and running thence through and over Sections 12, 1, 2, 11, 3, and 2, in said Township 1 North, Range 5 East; and thence [146] through and over Sections 35, 26, and 25 in Township 2 North, Range 5 East of

said Meridian; and thence through and over Sections 30 and 19 in Township 2 North, Range 6 East of said Meridian; and thence through and over Sections 24 and 13 in Township 2 North, Range 5 East of said Meridian, all in Skamania County, State of Washington.

Together with all spurs, switches, branches, and extensions thereof, being the same railroad heretofore owned by the Cape Horn Railroad Company. Together also with all of the franchises, contracts and rights of way, easements, privileges, traffic agreements, rolling-stock, cars and engines now owned by said company, or which may hereafter be acquired by it, and all rents, incomes, tolls and profits accruing and to accrue from its said business. Together also with all future acquired property, real or personal or mixed, including all future extensions, improvements or betterments of the property hereafter acquired by said company.

And among the said properties so transferred and conveyed are the following leases and rights of way in fee in and across certain lands in Skamania County in the State of Washington, more particularly described as follows:

All those certain rights of way, leases and rights of way in fee in and across certain lands in said Skamania County, in the State of Washington, and more specifically described as follows:

Twenty year lease from April 12, 1909, for railroad across East half Northeast quarter Section 25, Township 2 North, Range 5 East, Willamette Meridian.

Fifteen year lease from May 16, 1908, for railroad across East half Southeast quarter Section 3, Township 1 North, Range 5 East, Willamette Meridian.

Fifteen year lease from May 16, 1908, for railroad across Southwest quarter Section 2, Township 1 North, Range 5 East, Willamette Meridian; and southwest quarter of Northwest quarter said Section 2.

Fifteen year lease from April 16, 1908, for railroad across Southeast quarter of Southeast quarter Section 23, Township 2 North, Range 5 East.

Right of way in fee 100 feet wide across West half Northwest quarter Section 25, Township 2 North, Range 5 East, Willamette Meridian.

Railroad right of way over Lot 2, Southeast quarter of Northwest quarter and South half of Northeast quarter Section 19, Township 2 North, Range 6 East, Willamette Meridian.

Fifteen year lease from June 10, 1910, for railroad across East half Northeast quarter Section 3, Township 1 North, Range 5 East, Willamette Meridian.

Fifteen year lease from June 9, 1909, for railroad across Southeast quarter Section 26, Township 2 North, Range 5 East, Willamette Meridian. **[147]**

Fifteen year lease from June 13, 1910, for railroad across Southeast quarter Section 26, Township 2 North, range 5 East, Willamette Meridian.

Fifteen year lease from June 3, 1910, for railroad across Northwest quarter Northwest quarter Section 2, Township 1 North, Range 5 East; Southeast quarter Southwest quarter, and Northwest quarter Southeast quarter, and Southwest quarter Northeast

quarter Section 35, Township 2 North, Range 5 East.

Fifteen year lease from June 6, 1910, for railroad across East half Northwest quarter Section 35, Township 2 North, Range 5 East, Willamette Meridian.

Fifteen year lease from June 3, 1910, for railroad across Northeast quarter Southwest quarter Section 35, Township 2 North, Range 5 East.

Fifteen year lease from May 31, 1910, for railroad across Southeast quarter Section 2, Township 1 North, Range 5 East, Willamette Meridian.

Fifteen year lease from May 31, 1910, for railroad across all shore and tide lands in front of Lots 1 and 2, Section 12, Township 1 North, Range 5 East, Willamette Meridian, and a certain portion of Lot 3 of said Section, in all a frontage of 71.50 chains along the meander line. . .

Fifteen year lease from June 3, 1910, for railroad across North half Northwest quarter Section 11, Township 1 North, Range 5 East, Willamette Meridian.

Fifteen year lease from May 31, 1910, for railroad across South half Southwest quarter, Southwest quarter Southeast quarter, and Lot 1 in Section 1, and Lots 1, 2, 3, and 4, in Section 12, Township 1, Range 5 East, Willamette Meridian.

Fifteen year lease from May 31, 1910, for railroad across Northeast quarter Northwest quarter, Northwest quarter Northeast quarter Section 11, Southwest quarter Southwest quarter, Section 1 and Lot 1, in Section 12, Township 1 North, Range 5 East, Willamette Meridian.

Fifteen year lease from June 3, 1910, for railroad

across Northwest quarter Northwest quarter Section 2, Township 1 North, Range 5 East; Southeast quarter Southwest quarter and Northwest quarter Southeast quarter and Southwest quarter Northeast quarter Section 35, Township 2 North, Range 5 East.

Fifteen year lease from June 2, 1910, for railroad across Northeast quarter Northwest quarter Section 2, Township 1 North, Range 5 East, Willamette Meridian.

Fifteen year lease from June 6, 1910, for railroad across West half Northeast quarter Section 23, Township 2 North, Range 5 East, Willamette Meridian.

Fifteen year lease from May 31, 1910, for railroad across Northeast quarter Section 26, Township 2 North, Range 5 East, Willamette Meridian. [148]

Fifty year lease from June 2, 1910, for railroad across Southwest quarter Northeast quarter, Northwest quarter Southeast quarter, North half Southwest quarter Section 25, Township 2 North, Range 5 East, Willamette Meridian.

Fifteen year lease from June 25, 1908, for railroad across Northwest quarter Northeast quarter Section 35, Township 2 North, Range 5 East.

Fifteen year lease from May 16, 1908, for railroad across Southwest quarter Northwest quarter and Southwest quarter Section 2, Township 1 North, Range 5 East, Willamette Meridian.

Right of way in fee 100 feet wide across West half Northeast quarter and East half Northwest quarter Section 23, Township 2 North, Range 5 East, Willamette Meridian.

Railroad right of way across Lot 2, Southeast quar-

ter Northwest quarter, and South half Northeast quarter, Section 19, Township 2 North, Range 6 East, Willamette Meridian.

Twenty year lease for railroad across East half Northeast quarter Section 25, Township 2 North, Range 5 East, Willamette Meridian.

Fifteen year lease from May 27, 1911, right of way across Northwest quarter Section 17, Township 2, Range 6.

All of which leases and grants of rights of way have been filed for record and are duly recorded in the office of the County Auditor of said Skamania County, Washington.

(2)

Also that certain tract of land beginning at Northwest corner Northeast quarter Section 35; thence East along the Section line between Sections 26 and 35, 10 chains; thence South parallel with center line of Section 35, 10 chains; thence West parallel with the North line of Section 35, 10 chains; thence North following subdivision line, 10 chains to beginning; all in Township No. 2 North, Range 5 East of the Willamette Meridian, in said Skamania County, Washington.

(3)

All and singular the rights of way, roadbed and bridges, easements, railway tracks, spurs, sidetracks, switches, sidings, terminals, shops, grounds, depots, stations, power houses and power machinery, locomotives, tenders, cars and other rolling stock and equipment, furniture, tools, and all implements, appendages and appurtenances to or used in connection

with said railroad in any manner whatsoever; and all property wheresoever situate now belonging to or in the possession of the Railroad Company, or which shall hereafter be by it acquired, constructed, or provided for use as a part of or for use upon or in connection with or by way of additions to or extensions or equipment of said railroad; together with all the reversions, remainders, revenues, rents, income, tolls, fares and profits thereof. [149]

(4)

All accounts due or to become due, bonds, mortgages, notes, liens, leases, easements, agreements, maps, surveys, licenses, immunities, rights, privileges, franchises and grants appertaining to or owned, held, enjoyed or at any time hereafter acquired by the Railroad Company in connection with its said railroad.

(5)

Any and all contracts and agreements with the Timber Company, the Blazier Company, and with any other corporation or corporations, associations, partnerships and individuals for the hauling of logs, cordwood or other timber products, and of supplies, materials, goods and merchandise of any and every kind and character, whether such contracts and agreements be now owned or made by the Railroad Company, or be at any time hereafter made or acquired by it, together with all rights, interests, claims, moneys, rentals or tolls conferred or granted by or acquired under, or due or to become due upon any or all of such contracts or agreements.

(6)

All property of every name and nature now owned or hereafter acquired, or at any time, and from time to time hereafter, by delivery or by writing of any kind for the purposes hereof, conveyed, pledged, assigned or transferred by the Railroad Company or anyone in its behalf to the Trustee, who is hereby authorized at any time and from time to time to receive any property as and for additional security, and also when and as hereinafter provided as substituted security, for the payment of the notes issued hereunder, and according to the terms hereof to hold and to apply any and all such property.

(7)

All of the railways, right of way, tracks, lines, extensions, additions, spurs, sidings, and any and all other property, real, personal and mixed, of every kind and description now owned by the Railroad Company or which, at any time, and from time to time hereafter, shall be purchased, acquired, constructed, or provided for use upon or in connection with or as additions to or branches or extensions of the railroad and property now owned by the Railroad Company or otherwise under its present powers or under powers or privileges that may hereafter be conferred upon it; and any and all the reversions, remainders, revenues, rents, profits, tolls and other income of such railroad and of any and all additions to and branches and extensions thereof; together with all and singular the equipment, rights, privileges, immunities and franchises now or hereafter appurtenant thereto or used in connection with the said

railway of the Railroad Company or any addition to or branch or extension thereof, whether now constructed or owned or hereafter constructed or acquired by the Railroad Company.

It was the true intent and agreement of the parties hereto that said indenture was to and did convey all of the property, real, personal and mixed of every kind and wheresoever situate, and all appendages and appurtenances thereto, and **[150]** all of the equities of redemption, reversions, interests, liens, franchises, rights, privileges, immunities, claims and demands, as well in equity as in law, then owned, possessed or enjoyed, and which might hereafter be in anywise acquired, owned, possessed or enjoyed by the Railroad Company, notwithstanding that the same was not particularly set forth in said indenture and is not hereinabove specifically described.

That said after-acquired property clause in the mortgage of the said defendant Railroad Company did cover and include the 400 railroad bonds hereinbefore referred to.

The property mortgaged, transferred and conveyed, and intended to be mortgaged, transferred and conveyed by the Timber Company is described as follows:

The East half of the Northeast quarter of Section 25; the North half of the North half of Section 24; the East half of the Northeast quarter and the North half of the Southeast quarter of Section 23; the East half and the East half of the West half and the Southwest quarter of the Northwest quarter and the Northwest quarter of the Southwest quarter of Section 14;

the whole of Section 13; the East half of Section 11; the Southeast quarter and the Southwest quarter of the Northeast quarter, and the Northeast quarter of the Northwest quarter, and the West half of the Northwest quarter and the Northwest quarter of the Southwest quarter, and the South half of the Southwest quarter of Section 12; the Southeast quarter of Section 2; the whole of Section 1, all in Township 2 North, Range 5 East, Willamette Meridian.

The Northwest quarter of Section 30; the Southwest quarter and the North half of the North half of Section 19; the whole of Section 18; the Southeast quarter of the Southeast quarter, and the Southwest quarter and the Southwest quarter of the Northwest quarter of Section 7; the Northwest quarter of Section 8; the Southwest quarter of the Southeast quarter and the Southwest quarter, and the Southeast quarter of the Northwest quarter and the West half of the Northwest quarter of Section 6; all in Township 2 North, Range 6 East, Willamette Meridian.

The North half of the Northeast quarter; the South half of the Southeast quarter of Section 34; the whole of Section 35; the South half and the Northeast quarter of Section 36; the South half of Section 25; the Southwest quarter, and the Southwest quarter of the Southeast quarter, and the Southwest quarter of the Northwest quarter of Section 26; the Northwest quarter of Section 24; the Southwest quarter of the Southeast quarter of Section 13, all in Township 3 North, Range 5 East, Willamette Meridian.

The whole of Section 31; the whole of Section 32; the whole of Section 28; the Northwest quarter of

Section 29; the Southwest quarter of Section 30; the Southwest quarter of Section 20; the Southeast quarter and the West half of Section 19; the whole of Section 18; the Southwest quarter of Section 17; the Southwest quarter of Section 8; all in Township 3 North, Range 6 East, Willamette Meridian. [151]

The total lands now owned by the Timber Company and above described, embracing about 10,800 acres, upon which there is shown by cruises of standard cruisers to be now standing timber in the aggregate amount of four hundred million feet.

And also the after acquired property, to wit:

The North half of the Northeast quarter of Section 24, Township 3, Range 5 East, and the South half of the North half of Section 19, Township 2 North, Range 6 East of the Willamette Meridian, in said Skamania County, Washington.

Also all real property, lands, timber and timber rights, and rolling stock of the Timber Company, of every kind and description now owned or hereafter acquired, and wherever situate, and all tenements, hereditaments, buildings, structures, warehouses, workshops, mills, plants and fixtures, all machinery, engines, and boilers, all documents, deeds, timber contracts and leases, maps, surveys, inventories and papers relating to the real estate and timber rights and contracts conveyed hereby, now owned or hereafter acquired, and all rents, issues and profits, earnings and income from the property hereby conveyed. Together also with all property of the above kind and nature and description held and owned by the Timber Company at the time of its said mortgage, or

which may at any time thereafter have been acquired or owned in any manner.

Together also with $600,000 par value of the first mortgage six per cent gold bonds of the Washington Northern Railroad Company, dated June 4, 1910, maturing May 1, 1928, together with all rights attached to said bonds under that certain mortgage deed of trust executed by said Washington Northern Railroad Company, conveying to the Mississippi Valley Trust Company, as Trustee, all the property, real, personal and mixed, then owned or thereafter acquired by said Railroad Company to secure the payment of the aforesaid bonds.

That subsequent to the bringing of this suit on proceedings proper to be had therefor, H. E. Collins, as Receiver of the Washington Northern Railroad Company, secured title to the following described real property:

The East half of the Southeast quarter of Section 9; and the North half of the Northwest quarter of Section 15, all in Township 2 North, Range 6 East, Willamette Meridian, situate in Skamania County, Washington.

On March 1, 1912, the Washington Northern Railroad Company, the Oregon-Washington Timber Company, and the Blazier Timber Company, all of which said companies being then owned, dominated and controlled by the same set of people, and practically and in effect one company, pursuant to the unanimous resolution of the Stockholders and Board of Directors of the said companies, executed and delivered to the defendant, William W. Crawford,

Trustee, their mortgage deed of trust, whereby they transferred and conveyed to the said Trustee the property of the Railroad hereinbefore described and which prior thereto had been mortgaged to the Mississippi Valley Trust Company as Trustee, as hereinbefore found, under the mortgage of date June 4, 1910, and the property of the Timber Company which had theretofore been mortgaged under its first mortgage of June 4, 1910, to the Mississippi Valley Trust Company as Trustee, and which is hereinbefore described [152] and which has been mortgaged likewise by said Timber Company by its second mortgage of June 4, 1910, hereinbefore found, and the said Railroad Company, one of the mortgagors to said mortgage, undertook to, and did, assign to said Crawford, Trustee, as part security under said mortgage, $400,000 of the second mortgage bonds of the Timber Company, issued under its said second mortgage, and $1,000,000 first mortgage bonds of the Railroad Company as they should thereafter from time to time be released and delivered, or releaseable and deliverable, by the Mississippi Valley Trust Company under the terms and provisions of the first and second mortgage deeds of trust, respectively, of the Timber Company to said Mississippi Valley Trust Company. That the effect of the assignment of the railroad bonds so made was to assign the same subject to the prior lien and claim of the holders of the 600 railroad bonds first issued, and to postpone the rights of William W. Crawford, Trustee, in the railroad security until after the said 600 railroad bonds had been fully paid and discharged. And the said

Oregon-Washington Timber Company by said mortgage transferred and conveyed the timber lands and properties by the said Timber Company then held and owned, and hereinbefore described, together with all timber and timber rights, rights of way, easements, railroads, logs or logging roads, buildings, workshops, mills, plants, office and store buildings, fixtures, machinery, engines, boilers, rolling stock, teams, logging equipment then or thereafter located on said real estate or elsewhere, and then or thereafter acquired by the said Timber Company, together with the revenues, rents, incomes, tolls, fares and profits thereof.

All of such personal property covered by the foregoing description to be considered as fixtures and appurtenant to and constituting part of the real property of the Timber Company.

Also all accounts due or to become due, deeds, records, bonds, mortgages, notes, liens, leases, easements, agreements, maps, surveys, licenses, immunities, rights, privileges, franchises and grants, and all other property and property rights of whatever nature or character, real, personal or mixed, and wherever situate then, at the time of the execution of said mortgage, owned, held, possessed, or enjoyed by the Timber Company, or at any time thereafter acquired by it, and any and all rights or interest therein or thereto, and the reversions, remainder, rents, incomes, issues and profits thereof.

And by the Blazier Timber Company there was transferred and conveyed to said Crawford, Trustee, as security under the said mortgage, the follow-

ing described property then claimed by the Blazier Timber Company, to wit:

Lot 1, the East half of the Northwest quarter and the Southwest quarter of the Northeast quarter of Section 7, and the Southwest quarter of Section 8 in Township 2 North, Range 6 East of the Willamette Meridian.

North half of Southwest quarter, Southeast quarter of Southwest quarter Section 9, Township 2 North, Range 6 East of the Willamette Meridian.

Southeast quarter Section 17, Township 2 North, Range 6 East of the Willamette Meridian.

Northeast quarter and West half Southeast quarter Section 9, Township 2 North, Range 6 East of the Willamette Meridian. [153]

Southeast quarter of Northeast quarter, Northeast quarter of Southeast quarter, West half of Southeast quarter Section 7, Township 2 North, Range 6 East of Willamette Meridian.

All timber and railroad right of way for twenty years on Northeast quarter Section 17, Township 2 North, Range 6 East of the Willamette Meridian.

Southeast quarter Section 17, Township 2 North, Range 6 East of the Willamette Meridian.

All timber on Northeast quarter, North half Northwest quarter, Southeast quarter Northwest quarter, and South half Section 16; the Northwest quarter of Section 17, Township 2 North, Range 6 East of the Willamette Meridian. Also all the timber on the West half of the Northeast quarter and the East half of the Northwest quarter of Section 23, Township 2 North, Range 5 East. Also a right of way over said

Northwest quarter of Section 17, Township 2 North of Range 6 East of the Willamette Meridian.

Together with all timber and timber rights, rights of way, easements, railroads, logs or logging roads, buildings, workshops, mills, plants, office and store buildings, fixtures, machinery, engines, boilers, rolling stock, teams, logging equipment at the time of the mortgage or at any time thereafter, located on the said real estate, together with all appendages, appurtenances, reversions, remainders, revenues, rents, income, tolls, fares and profits thereof, and all accounts due or to become due, deeds, bonds, books, records, mortgages, notes, liens, leases, easements, agreements, maps, surveys, licenses, immunities, rights, privileges and grants, and all other property and property rights of whatsoever character and nature, real, personal or mixed, and wheresoever situated, then owned, possessed or enjoyed by the said Blazier Timber Company, or at any time thereafter acquired.

And said mortgage to Crawford, Trustee, having been so executed as to entitle it to record, the same was duly recorded in the office of the Auditor of Skamania County, Washington, on the 9th day of April, 1912, in Book "L" of Mortgages, beginning at page 68, and in Book "O" of Chattel Mortgages, at page 144. Said mortgage recited the fact of the execution of the mortgage by the Railroad Company of June 4, 1910, to the Mississippi Valley Trust Company and of the issuance of mortgage bonds thereunder to the aggregate amount of $1,000,000 and the execution of the first mortgage by the Timber Com-

pany of June 4, 1910, and of the issuance and negotiation of $600,000 of mortgage bonds thereunder, and the execution of the second mortgage by the Timber Company of June 4, 1910, and the issuance and negotiation of $400,000 of mortgage bonds thereunder, and recited and declared that the said mortgage to the said Crawford, Trustee, was executed and taken subordinate to and subject to the said mortgages. Said mortgage to said Crawford, Trustee, was executed and delivered to secure payment of $425,000 and interest thereon at six per cent per annum, payable semi-annually on the first days of March and September each year, the installments of interest being evidenced by appropriate coupons attached to various notes referred to in the mortgage as the "first and general lien six per cent gold notes," numbers 1 to 425, both inclusive of the denomination of $1,000 and payable serially, all bearing date March 1, 1912, with due dates in part beginning September 1, 1912, the last notes maturing March 1, 1917, which were negotiated and put out by the mortgagor companies. And by the terms of the said mortgage to Crawford, Trustee, the mortgagors covenanted and agreed to pay the mortgage notes as and when the same fell due and the [154] interest thereon, evidenced by the interest notes attached thereto, and covenanted and agreed to pay all taxes of every kind assessed or levied against the properties described in the mortgage, or against the mortgage note holders arising by their ownership of the notes and it was provided by the mortgage likewise that upon any default being made in the payment of the principal

of the notes as and when the same fell due, or any default in the payment of the interest thereon as and when the same fell due, and if such default should continue for a period of sixty days after written notice thereof to the mortgagors by the trustees, or to the companies or the trustees by the holders of at least five per cent of the notes then outstanding, then and in that event the trustees might declare as immediately due and payable all of the said principal notes, and the interest thereon, anything in the notes or the mortgage to the contrary notwithstanding. As likewise was it provided by the mortgage that upon any foreclosure of the said mortgage, for any moneys due thereunder, and of sale of the property described in the mortgage, the principal of all notes outstanding and secured by the mortgage should immediately become due and payable, if not previously due, anything in the notes or the mortgage to the contrary notwithstanding. As it was provided likewise that upon any sale of the properties described in the mortgage, all of the property described therein might be sold as an entirety.

That $30,000 has been paid on account of the principal of the said Crawford mortgage, but $395,000 of the principal of the said debt is still unpaid, and the interest accruing from and after September 1, 1912, is also unpaid. That the interest provided for in and by the terms of the said mortgage is interest at the rate of six per cent per annum.

And it is now found and determined that the first mortgage hereinbefore referred to of the Washington Northern Railroad Company to the Mississippi

Valley Trust Company, Trustee, of June 4, 1910, upon which there is due the sum of $970,000 and interest at six per cent per annum from May 1, 1912, and the first mortgage of the Oregon-Washington Timber Company, to the Mississippi Valley Trust Company, Trustee, of June 4, 1910, upon which there is due $570,000 and interest at six per cent per annum from May 1, 1912, and the second mortgage of the Oregon-Washington Timber Company to the Mississippi Valley Trust Company, Trustee, of June 4, 1910, on which there is due the sum of $400,000 and interest from the first day of May, 1912, were all executed and designed, and the proceeds realized, or to be realized under either or all of the said mortgages were designed as security for one debt, to wit, the indebtedness of the Oregon-Washington Timber Company under its first mortgage of June 4, 1910, the amount due upon which is $570,000 and interest at six per cent per annum from May 1, 1912, and the mortgage executed and delivered by the Washington Northern Railroad Company, the Oregon-Washington Timber Company, and the Blazier Company to William W. Crawford, Trustee, and the proceeds realized and to be realized thereunder, were designed as security for a single debt, to wit, the indebtedness referred to in the said mortgage, upon which there is due and unpaid the sum of $453,591.67 and interest from the 20th day of February, 1915, at six per cent per annum, which said mortgage to said Crawford, Trustee, it is now found and determined is a second mortgage, subsequent and subordinate to the other three mortgages hereinbefore found and en-

titled the trustees thereof to take and receive, and [155] apply upon the said mortgage debt all surplus proceeds of sale which may be realized from the sales of the properties mentioned and described in either of the said three mortgages hereinbefore found, such proceeds to be first applied upon the mortgage debt hereinbefore found from the Oregon-Washington Timber Company of June 4, 1910, upon which there is due, as hereinbefore found the sum of $570,000 and interest at six per cent per annum from May 1, 1912, save and excepting that under the said mortgage to the said Crawford, Trustee, there is a first lien upon all and singular the timber lands of the Blazier Timber Company described therein.

That subsequent to the execution of the mortgage to William W. Crawford, Trustee, of date March 1, 1912, the Blazier Timber Company acquired by bill of sale from the Wiest Logging Company logging equipment described as follows, to wit:

LOGGING EQUIPMENT.

2—10x13 Humboldt Yarding Engines with 60 inch Boilers.

1—10x12 Washington Iron Works Yarding Engine with Sled.

2—10x13 Humboldt Yarding Engine 66 inch Boilers with Sleds.

2—11x13 Mogul Roading Engine 66 inch Boilers with Sleds.

1—10x13 Humboldt Yarder with 66 inch Boiler and Sled.

3—7x10 Loading Engines with Sleds.

5000 ft. 1½ inch Water Pipe at 4½ cts.

2—Duplex Pot Valve Pumps with Boilers and Fixtures.
1—Small Steam-pump with Fixtures.
3—Large Water-tanks.
2—Blacksmithing Outfits with Shop and Tools complete,—and iron and steel on hand.
60—Trip Blocks at $9.00.
40—Bouse Yarding Blocks at $18.00.
11—Head Blocks at $22.50.
2—14 inch Willamette Butt Chain Blocks at $40.00.
6—16 inch Willamette Butt Chain Blocks at $60.00.
3—18 inch Columbia Butt Chain Blocks at $80.00.
4—New Lines each 1600 feet long, $650.00 each.
4—Main Lines on Donkeys, worn some, $325.00 each.
5—New Trip Lines, each 4000 feet long, $450.00 each.
2—Trip Lines, worn some, $225.00 each.
1000 feet New Yarding Line.
500 feet Choker Line.
32—Chokers.
32—Yarding Lines.
7—Loading Lines, 200 feet each, at $30.00.
Dishes, Cook-house, Stoves, Cooking Utensils, Groceries and Commissary Goods on hand.
3—Cook-houses.
8—Bunk-houses.
200—Springs and Mattresses at $4.00.

1—Commissary Building.
4—Double Loading Blocks at $28.50.
4—Single Loading Blocks at $18.50.
7—Jack Screws at $40.00.
15—Butt Chains at $20.00.
40—Choker Hooks at $5.25.
30—Yarding Hooks at $2.50. **[156]**

LOGGING EQUIPMENT (Continued):
9—Set of Loading Hooks at $10.00.
60—Choker Sockets at $2.75.
6—Pair Grabs at $7.50.
3—Stump Rollers.
75—Saws at $6.00.
75—Sledges at $4.00.
120—Bucking Wedges at $1.50.
40—Falling Wedges at $2.50.
8—Doz. Axes at $12.00.
6—Doz. Shovels at $12.00.
6—Doz. Mattocks at $7.50.
1—Extra Steel Yarding Drum for 10x13 Humboldt Yarder.
One Ton of Powder and 500 Caps on hand.
Engine, Lubricating and Coal Oil on hand.

That the said logging equipment thereupon became subject to the lien of the mortgage given to the defendant William W. Crawford, trustee, under the after-acquired property clause in the said mortgage. That a portion of the said equipment, consisting of 11 Donkey-engines, is now in the hands and under the control of H. E. Collins, receiver of the Washington Northern Railroad Company.

That it is provided in the mortgage given by the

Washington Northern Railroad Company, of date June 4, 1910, and in the mortgage given by the Oregon-Washington Timber Company, of date June 4, 1910, and by the mortgage given to the defendant William W. Crawford, of date March 1, 1912, that the proceeds of any sale of the respective properties described in the said mortgages and given as security for the debts named therein should be applied to the payment of accrued interest before the payment of the principal of the debt in each case secured.

That it was provided in each of the said mortgages that in case a suit should be brought to foreclose either or any thereof that in each case the mortgagors would pay to the mortgagee, in addition to the debt specified in the said mortgage such sum as the Court should adjudge reasonable as attorneys' fees for the foreclosure of said mortgage. That the sum of $33,250 is a reasonable attorney's fee to be allowed complainants for the services of their attorneys in this suit. That the sum of $2500 is a reasonable sum to be allowed the defendant, William W. Crawford, trustee, for the services of his attorney in foreclosing the mortgage executed in favor of the defendant, William W. Crawford, trustee, in this suit.

That it was also provided in and by the mortgage given by the Washington Northern Railroad Company and by the mortgage given by the Oregon-Washington Timber Company, under date of June 4, 1910, that in the event of a foreclosure of either of the said mortgages the mortgagor would in each case pay to the trustee such sum as should be adjudged reasonable for the services of the trustee in

conducting said foreclosure, and in protecting the interest of the bondholders therein. That the sum of $1500 is a reasonable sum to be allowed the complainants for their services as trustees.

That at the inception of this suit at the instance of complainants, H. E. Collins was duly appointed receiver of the [157] Washington Northern Railroad Company, and receiver of the Oregon-Washington Timber Company. That upon proceedings proper to be had therefor the said receiver has issued receiver's certificates as receiver of the Washington Northern Railroad Company in the aggregate sum of $16,500, and that it will be necessary for him to issue certificates in the approximate sum of $3,000 additional for the payment of taxes about to become due and payable on the properties of the Washington Northern Railroad Company. That on proceedings proper to be had therefor the said H. E. Collins as receiver of the Oregon-Washington Timber Company has issued and sold receiver's certificates of the aggregate amount of $8,500, and that it will be necessary for him to issue and sell additional receiver's certificates to the amount of approximately $2,000 for the payment of taxes about to become due and payable on the properties of the Oregon-Washington Timber Company. That the said receiver's certificates issued and to be issued are in each case a prior and preferred lien on the properties of the Washington Northern Railroad Company and the Oregon-Washington Timber Company, respectively.

IT IS NOW CONSIDERED, ADJUDGED AND DECREED: That the first mortgage given by the

Oregon-Washington Timber Company on the 4th day of June, 1910, to Mississippi Valley Trust Company and which is now held by Mississippi Valley Trust Company and Union Trust Company, be and it is hereby foreclosed.

IT IS FURTHER CONSIDERED, ADJUDGED AND DECREED: That the mortgage given by the Washington Northern Railroad Company to Mississippi Valley Trust Company on the 4th day of June, 1910, be and it is hereby foreclosed.

IT IS FURTHER CONSIDERED, ADJUDGED AND DECREED: That the mortgage given by the Oregon-Washington Timber Company, Washington Northern Railroad Company and the Blazier Timber Company, to the defendant William W. Crawford, trustee, on the 1st day of March, 1912, be and it is hereby foreclosed.

IT IS CONSIDERED, ADJUDGED AND DECREED: That within thirty days from this date the Washington Northern Railroad Company pay into the registry of this court the sum of $16,500, with accrued interest thereon, and such additional sum as shall be necessary to take up and pay all receiver's certificates issued by the receiver of the Washington Northern Railroad Company. That within thirty days from this date the Oregon-Washington Timber Company do pay into the registry of this court the sum of $8,500 with accrued interest thereon, and such additional sum as shall be necessary to take up and discharge the receiver's certificates issued by the receiver of Oregon-Washington Timber Company.

IT IS FURTHER CONSIDERED, ADJUDGED AND DECREED: That within thirty days from this date the Oregon-Washington Timber Company and the Washington Northern Railroad Company do pay to complainants the full sum of $570,000, with interest thereon at the rate of six per cent per annum from May 1, 1912, and the further sum of $33,250, as an attorney's fee adjudged to be due and owing from the said mortgagor defendants to complainants. [158]

IT IS FURTHER CONSIDERED, ADJUDGED AND DECREED: That within thirty days from the date of this decree the defendants, Oregon-Washington Timber Company, Washington Northern Railroad Company, and Blazier Timber Company, do pay to the defendant William W. Crawford, trustee, the sum of $453,591.67, with interest from February 20th, 1915, at the rate of six per cent per annum.

IT IS FURTHER ADJUDGED AND DECREED: That in default of such payment a certified copy of this decree be furnished to B. A. Crowl, who is hereby named Master in Chancery, and charged with the duty of selling the properties hereinbefore described.

IT IS CONSIDERED, ADJUDGED AND DECREED: That the said Master in Chancery do proceed, in default of the payments hereinbefore specified, to sell the properties of the Oregon-Washington Timber Company hereinbefore specified, both those originally described in the mortgage of the said Oregon-Washington Timber Company and those after acquired by it and hereinbefore listed. Said

sale to be in the manner prescribed by law for the sale of real property sold on execution within the State of Washington, and the said sale to be made at the door of the Court-house at Stevenson, Skamania County, Washington.

IT IS CONSIDERED, ADJUDGED AND DECREED: That the proceeds of the said sale be applied:

1. To the payment of the costs of the said sale.
2. To the payment of the certificates of the receiver of the Oregon-Washington Timber Company.
3. To the payment to Wallace McCamant, solicitor for complainants, of the sum of $33,250, the attorney's fee adjudged to be due him for services rendered by him in this cause.
4. To the payment of the interest coupons maturing November 1, 1912, on the bonds of the Oregon-Washington Timber Company, of date June 4, 1910.
5. To the payment of the mortgage debt aforesaid, to wit, the sum of $570,000 with interest thereon at the rate of 6% per annum from May 1, 1912, less the face of the coupons maturing November 1, 1912.
6. To the payment to E. S. McCord, solicitor for the defendant, William W. Crawford, trustee, of the sum of $2,500, the attorney's fee allowed him for the foreclosure of the Crawford mortgage.
7. To the payment to William W. Crawford, trustee, of the sum of $453,591.67, with interest from the 20th day of February, 1915.

8. The overplus, if any, to be paid into court to be distributed in such manner as the Court may direct.

IT IS CONSIDERED, ADJUDGED AND DECREED: That any funds in the hands of the Receiver on the day of sale, over and above that required to pay his outstanding indebtedness, be paid by him to the purchaser at the said sale, and that the purchaser at the said sale take the said property charged with the burden of paying any unpaid obligations of the said receiver, but that the [159] purchaser take the said property free from all other liens and incumbrances, and free from all claims of all kinds and descriptions on behalf of the several parties to this suit, and that the purchaser take such title to the said property as was had by the Oregon-Washington Timber Company on the 4th day of June, 1910, together with all title by it since acquired. That the purchaser be let into possession of the said premises, and that when the period for redemption has expired that a deed be executed to the purchaser, or his successor in interest, provided the property be not redeemed in the manner provided by the laws of the State of Washington.

In case the purchase price of the properties of the Oregon-Washington Timber Company shall be inadequate to the payment of the several sums of money hereinbefore specified:

IT IS CONSIDERED, ADJUDGED AND DECREED: That the Master in Chancery shall then sell, in the same manner and in accordance with the requirements of the laws of Washington governing

the sale of real property, all of the properties of the Washington Northern Railroad Company hereinbefore described, including as well the properties originally listed in its mortgage as the properties acquired by it subsequent thereto.

IT IS CONSIDERED, ADJUDGED AND DECREED: That the proceeds of the sale of the said properties of the Washington Northern Railroad Company be devoted as follows:

1. To the payment of the costs of the said sale.
2. To the payment of the certificates of the receiver of the Washington Northern Railroad Company.
3. To the payment to Wallace McCament, solicitor for complainants, of the sum of $33,250, the attorney's fee adjudged to be due him for services rendered by him in this cause.
4. To the payment of the coupons maturing November 1, 1912, on the bonds of the Washington Northern Railroad Company, of date June 4, 1910, numbered 1 to 600, less the 30 bonds which have been paid up and surrendered to said railroad company.
5. To the payment of the mortgage debt aforesaid, to wit, the sum of $570,000 with interest thereon at the rate of *6*— per annum from May 1, 1912, less the face of the coupons maturing November 1, 1912, on bonds 1 to 600, less the 30 bonds which have been paid and retired.
6. To the payment to E. S. McCord, solicitor for the defendant, William W. Crawford, trustee, of the sum of $2,500, the attorney's fee

allowed him for the foreclosure of the Crawford mortgage.

7. To the payment to William W. Crawford, trustee, of the sum of $453,591.67, with interest from the 20th day of February, 1915.
8. The overplus, if any, to be paid into court, to be distributed in such manner as the Court may direct. [160]

IT IS CONSIDERED, ADJUDGED AND DECREED: That the receiver of the Washington Northern Railroad Company do pay to the purchaser at the said sale such funds as may be in his possession on the day of sale over and above what shall be necessary to pay the obligations of the said receiver, and that the purchaser at the said sale take the said property charged with the burden of paying any unpaid obligations of the said receiver, but that the purchaser take the said property free from all other liens and incumbrances, and free from all claims and demands of all the parties to this suit, and that he take such title thereto as was had by the Washington Northern Railroad Company on the 4th day of June, 1910, together with all title by it since acquired.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED: That the purchaser be let into the possession of the said premises, and that on the expiration of the period allowed for redemption under the statutes of Washington that a deed be executed in favor of the purchaser, and of his successor in interest, if any, unless the property shall, within the period allowed therefor by law, be re-

deemed from the lien effect of the said sale in the manner prescribed by the statutes of the State of Washington.

IT IS FURTHER ADJUDGED AND DECREED: That the said Master in Chancery do proceed to sell the properties of the Oregon-Washington Timber Company as an entirety, and the properties of the Washington Northern Railroad Company as an entirety.

IT IS FURTHER ADJUDGED AND DECREED: That the first parcel to be sold at said sale shall be the property acquired by H. E. Collins as receiver of the Washington Northern Railroad Company, and hereinbefore specifically described, and that the proceeds of the sale of the said property be applied to the payment of the receiver's certificates issued by the said H. E. Collins, as receiver of the Washington Northern Railroad Company.

IT IS FURTHER ADJUDGED AND DECREED: That in default of the payment hereinbefore specified to be made to the defendant, William W. Crawford, trustee, within thirty days from the date of this decree that the said Master in Chancery do proceed to sell the logging equipment purchased from the Wiest Logging Company, and hereinbefore described, and the properties of the Blazier Timber Company hereinbefore described, and that the proceeds of the said sale be applied:

1. To the expenses of the said sale.
2. To the payment of the sum of $2,500 to E. S. McCord, senior solicitor for the defendant, William W. Crawford, as his attorney's fee.

3. To the payment of the sum of $453,591.67 and interest from the 20th day of February, 1915, at 6% per annum, preference being given to accrued interest on the said debt.

IT IS CONSIDERED, ADJUDGED AND DECREED: That the purchaser of the said logging equipment and of the said properties of the said Blazier Timber Company take such title thereto as was had by Blazier Timber Company on the 1st day of March, 1912, with all title by it since acquired and all title held by the several parties to this suit. **[161]**

IT IS CONSIDERED, ADJUDGED AND DECREED: That the Master in Chancery aforesaid be and he is hereby authorized and empowered to advertise all of the said properties at the same time to be sold at the same time and at a time to be fixed by him.

It being adjudicated by this decree that the first mortgage given by the Oregon-Washington Timber Company under date of June 4, 1910, to Mississippi Valley Trust Company, and now held by Mississippi Valley Trust Company and Union Trust Company, secures the same debt as that evidenced by the mortgage and bonds of the Washington Northern Railroad Company, of date June 4, 1910.

IT IS CONSIDERED, ADJUDGED AND DECREED: That all payments made on one of the said debts, whether made voluntarily by the debtor, or whether realized by property given as security for the debt, shall be credited likewise on the debt of the other of the said mortgagors; and it is adjudged and decreed that the said debt of $570,000 with interest thereon at the rate of 6% per annum from May 1,

1912, with the attorney's fee of $33,250 and the trustee's fee of $1,500 is to be paid but once, and that in so far as the same is paid out of the properties of the Oregon-Washington Timber Company it shall be satisfied, and shall not be again paid out of the properties of the Washington Northern Railroad Company.

IT IS CONSIDERED, ADJUDGED AND DECREED: That from and after the sale provided for in this decree each and every of the parties to this suit, and all persons claiming under them, be barred and foreclosed of all right, equity and title in the several properties hereinbefore described, excepting only the statutory right of redemption provided for by the laws of the State of Washington.

IT IS CONSIDERED, ADJUDGED AND DECREED: That complainants do have and recover their costs and disbursements of the defendant, William W. Crawford, trustee, and that the defendant William W. Crawford, trustee, recover his costs and disbursements from the defendants, Oregon-Washington Timber Company, Washington Northern Railroad Company, and Blazier Timber Company.

It appearing from the testimony in the cause that the complainant, Mississippi Valley Trust Company, has in its possession $4,500 paid to it by Oregon-Washington Timber Company, under the sinking fund provisions of the mortgage of the said defendant:

IT IS CONSIDERED, ADJUDGED AND DECREED: That $1,500 of this sum be retained by the said complainant for the use of the said complainant

and its cocomplainant, Union Trust Company and that the remainder of the said moneys be paid by the Mississippi Valley Trust Company on or before the day of sale to the receiver of the Oregon-Washington Timber Company, H. E. Collins, to be applied by him in payment pro tanto of the indebtedness of the receivership.

IT IS FURTHER CONSIDERED, ADJUDGED AND DECREED: That any and all of the parties to this suit may bid at the said sale, and that in payment of any bid interposed the bidder may tender to the Master in Chancery in payment thereof any receiver's certificates heretofore issued and outstanding and unpaid, which shall be received as cash at the face thereof with all accrued interest, and such bidder may likewise pay his bid by delivery to the Master in Chancery of outstanding bonds and coupons attached thereto; [162] Provided, however, that the bonds and coupons so tendered shall be received as a payment of the bid only in so far as the bonds and coupons so tendered shall be entitled to participate in the purchase price under the terms of the distribution of the proceeds hereinbefore provided for.

Any proposed bidder at the sale now decreed shall qualify to entitle him to become such bidder by depositing with the officer making the sale the sum of $5,000 in money, and by depositing further the sum, in money or receivership certificates, outstanding and issued by the receiver, and, or, bonds and coupons issued and negotiated under the first mortgage hereinbefore found of the Washington Northern Railroad

Company to the Mississippi Valley Trust Company of June 4, 1910, and, or, bonds and coupons issued and negotiated under the first mortgage hereinbefore found of Oregon-Washington Timber Company to the Mississippi Valley Trust Company of June 4, 1910, of the face value of said certificates, and, or said bonds, of $20,000. Such deposit to be made upon condition that if the sale be confirmed the bidder will make good his said purchase by paying the balance of the purchase price, either in money, and, or receivership certificates, and, or bonds or coupons for such sums as would be credited on said bonds and coupons had the entire bid been made in money, and if upon confirmation the bid of the purchaser be completed, the deposit shall be received and accepted as a part of the bid and purchase of the properties; and if on confirmation the bid be not completed, said deposit shall be forfeited and returned into court by the officer making the sale, less the charges and expenses of the sale, for credit to the cause, and the Court will further order and direct another and further sale of the properties.

Upon the coming in of the return of sale hereunder by the Master herein appointed to make the sale, and the sale being confirmed and the proceeds distributed in accordance with this decree, there shall be docketed a deficiency judgment or decree against the Washington Northern Railroad Company and in favor of the Mississippi Valley Trust Company, trustee, for the amount of such deficiency, if any, against said Washington Northern Railroad Company, the Mississippi Valley Trust Company to hold

said judgment and apply all proceeds which may be realized thereon upon any and all unpaid bonds and coupons ratably and proportionately, issued and negotiated by the Oregon-Washington Timber Company under its first mortgage of June 4, 1910, and a deficiency judgment or decree shall be docketed against the Oregon-Washington Timber Company and in favor of the Mississippi Valley Trust Company, trustee, and Union Trust Company, trustee, for all the sums of money unpaid after applying the proceeds of sale, the said deficiency judgment or decree to be held by the said Mississippi Valley Trust Company and Union Trust Company, trustees, in trust for all bondholders, holding unpaid bonds and coupons issued under the first mortgage of June 4, 1910, by the Oregon-Washington Timber Company to the Mississippi Valley Trust Company, trustee, and all proceeds which may be realized upon said deficiency judgment or decree shall be applied by the said trustees ratably and proportionately upon the said bonds and coupons. Provided, that the full sum of $570,000 and interest, together with costs and expenses herein declared, being realized and paid, either out of the proceeds of sale or upon the deficiency judgments now ordered, any surplus funds which may be realized shall be paid over by said trustees to William W. Crawford, trustee, who shall hold and apply the same ratably and proportionately upon the gold notes and interest coupons thereof issued and negotiated under the said mortgage to the said Crawford, trustee, and if there by surplus funds arising after so applying the same, such surplus funds

shall [163] be paid into the registry of the court for further order as to distribution thereof.

Let a deficiency judgment and decree be docketed in favor of the said William W. Crawford, trustee, and against Washington Northern Railroad Company, the Oregon-Washington Timber Company and the Blazier Timber Company for such deficiency as may be ascertained and determined, the said mortgage indebtedness of said Crawford, trustee, not being paid in full out of the proceeds of sale, and the said mortgage indebtedness being so paid and a surplus fund arising, the surplus fund shall be paid into the registry of the Court for further order and distribution thereof.

In the event of disqualification or inability to act of the Master in Chancery hereinbefore designated, the Court upon application therefor will make another appointment of Master Commissioner, and the power to so appoint in such case is hereby reserved.

Any personal property in the hands of the receiver of the Oregon-Washington Timber Company shall be delivered over by the receiver to the purchaser of the properties of the said company, and any personal property belonging to the Washington Northern Railroad Company shall be delivered over by the receiver to the purchaser of the properties of the Washington Northern Railroad Company.

The purchaser at any sale hereunder being entitled to a bill of sale, deed, or deeds for the properties purchased at the sale, the receiver of the court shall execute and deliver likewise a bill of sale, deed, or deeds to the purchaser of the property so purchased, and

the complainants herein, Mississippi Valley Trust Company, trustee, and Union Trust Company, trustee, and the defendants herein, Washington Northern Railroad Company and Oregon-Washington Timber Company, shall unite in any and all bills of sale, deed or deeds to which such purchaser is entitled, and in the event of the failure of either of the said parties to unite in such deeds or bill of sale, or separately to execute such deeds or bill of sale, this decree shall stand as and for the bill of sale, deed or deeds required by the decree to be executed by the said parties.

Either party to this cause may apply at the foot of the decree for such further order in the premises as may not have been adjudicated by this decree. Let this cause be adjourned over accordingly, and let a certified copy of this decree issue as and for process of enforcement thereof.

EDWARD E. CUSHMAN,
Judge.

Deft. and Intervenor W. W. Crawford excepts to the foregoing Decree and each and every part thereof, and his exceptions are allowed.

EDWARD E. CUSHMAN,
Judge.

(Filed Mar. 4, 1915.) [164]

Petition for Appeal [and Order of Allowance].

To the Honorable EDWARD E. CUSHMAN, District Judge:

The above-named William W. Crawford, trustee, feeling aggrieved by the decree rendered and entered

in the above-entitled cause on the 4th day of March, 1915, does hereby appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons set forth in the assignment of errors filed herewith, and prays that this appeal be allowed and that citation be issued as provided by law, and that a transcript of the record proceedings and documents upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit under the rules of such Court in such cases made and provided. And your petitioner further prays that the proper order relating to the required security to be required of him be made.

KERR & McCORD,

Solicitors for William W. Crawford, Trustee, Defendant and Cross-complainant.

The foregoing claim of appeal is allowed.

Dated this 13th day of August, A. D. 1915.

EDWARD E. CUSHMAN,

United States District Judge presiding in the above-named court.

(Acceptance of service.)

(Filed Aug. 13, 1915.) **[165]**

Order Allowing Appeal.

Upon motion of E. S. McCord, Esq., solicitor and counsel for William W. Crawford, defendant and cross-complainant, it is hereby ordered that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the decree heretofore filed and entered herein be, and the same is hereby, allowed, and that a certified transcript of the record, testi-

mony, exhibits, stipulations, and all proceedings be forthwith transmitted to said United States Circuit Court of Appeals for the Ninth Circuit.

It is further ordered that the bond on appeal be fixed at the sum of $1,000.00.

Dated this 13th day of August, A. D. 1915.

EDWARD E. CUSHMAN,

Judge of the United States District Court for the Western District of Washington, Southern Division.

(Acceptance of service.)

(Filed Aug. 13, 1915.) [166]

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS: That we, William W. Crawford, trustee, as principal, and American Surety Company, a corporation, as surety, are held and firmly bound unto the complainants in the sum of One Thousand Dollars ($1,000.00) lawful money of the United States, to be paid to them and their respective executors, administrators, successors and assigns; to which payment well and truly to be made we bind ourselves and each of us, jointly and severally, and each of our heirs, executors, administrators, successors and assigns, firmly by these presents.

Sealed with our seals and dated this the 13th day of August, A. D. 1915.

WHEREAS, the above-named William W. Crawford, trustee, has prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment and decree of the Dis-

trict Court of the United States for the Western District of Washington, Southern Division in the above-entitled cause.

NOW THEREFORE, the condition of this obligation is such that if the above-named William W. Crawford shall prosecute his said appeal to effect and answer all costs if he fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and effect.

WILLIAM W. CRAWFORD,
Trustee.

[Seal of Surety Co.]

By KERR & McCORD,
His Solicitors.

AMERICAN SURETY COMPANY OF NEW YORK.

By FRANK ALLYN, Jr.,
Resident Vice-pres. and Agent and
C. E. DUNKEEBERGER,
Res. Asst. Secy.

Approved this 13th day of Aug., 1915.

EDWARD E. CUSHMAN,
Judge.

(Acceptance of service.)
(Filed Aug. 13, 1915.) [167]

[Title of Court and Cause.]

Assignments of Error.

Comes now William W. Crawford, trustee, defendant and cross-complainant in the above-entitled case, and files the following assignments of error upon which he will rely upon his prosecution of his appeal

in the above-entitled cause [168] from the decree made by this Honorable Court on the 4th day of March, A. D. 1915.

I.

That the United States District Court for the Western District of Washington, Southern Division, erred in denying the motion interposed by the defendant and appellant, William W. Crawford, Trustee, to strike certain paragraphs and allegations contained in the original complaint filed in the case.

II.

That the said Court erred in denying the motion interposed by the defendant and appellant, William W. Crawford, Trustee, to strike certain paragraphs and allegations contained in the amended complaint filed in said case.

III.

That said Court erred in granting the motion of the complainants to strike certain paragraphs and allegations from the answer of the defendant, William W. Crawford, Trustee, and to strike certain paragraphs and allegations from the cross-complaint of the cross-complainant, William W. Crawford, Trustee.

IV.

That said Court erred in making and entering the following finding and holding contained in the decree:

> "Heretofore, and on June 4th, 1910, the defendant railroad company executed and delivered to complainant Mississippi Valley Trust

Company, as trustee, its certain deed of mortgage conveying and transferring to the trustee thereunder certain properties hereinafter described, and the same having been so executed as to entitle it to record the same was on June 10, 1910, duly recorded in the office of the auditor of Skamania County, Washington, wherein the properties therein described were situated, in book "I" of Mortgages, pages 339 to 356, both inclusive; said mortgage was executed to secure 1000 bonds, numbered from 1 to 1000, both inclusive, and of the denomination of $1000 each, dated as of June 4th, 1910, and maturing on May 1st, 1928, 600 of the bonds, numbered from 1 to 600, both inclusive, being by the railroad company duly negotiated and deposited with the Mississippi Valley Trust Company, as trustee, by way of collateral to a mortgage bond issue of the Oregon-Washington Timber Company of June 4th, 1910, hereinafter found **[169]** and determined, and 400 of the said bonds, numbered 601 to 1000, inclusive, were duly negotiated to the Oregon-Washington Timber Company and by it duly assigned to the railroad company as collateral under a second mortgage bond issued by the timber company as hereinafter found and determined. That the debt evidenced by the second mortgage bonds of the timber company has not been paid. That the interest of the railroad company in the said 400 railroad bonds immediately on its acquiring of the same became subject to the lien

of the 600 railroad bonds then outstanding, and the said 400 railroad bonds could be, and were in fact, reissued by the railroad company only as inferior in dignity and subsequent in time of payment to the 600 bonds first negotiated and then outstanding."

V.

The said Court erred in making and entering the following finding and holding contained in said decree:

"Thereafter and on June 4th, 1910, likewise said the Oregon-Washington Timber Company executed a second mortgage to the Mississippi Valley Trust Company, as trustee, of all and singular the property described in its first mortgage of June 4th, 1910, and of all and singular its ownership, right and title to $400,000 par value of the 6% first mortgage gold bonds of the Washington Northern Railroad Company, dated June 4th, 1910, and which by the terms of said mortgage matured May 1st, 1928. Said second mortgage likewise provided, and the second mortgage bonds issued thereunder so provided, that the mortgage debt should draw interest at 6% per annum, payable semi-annually, and by the terms of the mortgage security and of the bonds issued thereunder the bonds so issued were numbered from 1 to 400, both inclusive and matured serially, first maturity thereof beginning on May 1st, 1922, and terminating May 1st, 1928, and second mortgage bonds secured by said mortgage were negotiated by

the timber company and delivered to the Washington Northern Railroad Company, and for the said second mortgage bonds of the timber company, aggregating $400,000 and for consideration running from the said timber company to the railroad company said first mortgage bonds of the railroad company of June 4th, 1910, were issued, negotiated and delivered to the said timber company."

VI.

The said Court erred in making and entering the following finding and holding contained in the decree:

"In the contract for the purchase and sale of said second mortgage bonds it was provided:

As a further consideration for the sale to us of said $1,000,000 par value of your bonds and without any new or further consideration, we agree to sell and deliver to you $400,000 par value 6% gold bonds issued by us, dated the 1st day of May, 1910, due serially $30,000 par value every six months, beginning May 1st, 1922, and ending May 1st, 1928, secured by a second mortgage on our lands and timber in Skamania County, Washington, and secured also by $400,000 par value of the $1,000,000 par value of bonds now proposed to be purchased by us from you; said $400,000 par value of our bonds so sold to you, however, or the **[170]** proceeds of the sale thereof, to be used by you only for future extensions, betterments or equipment to your railroad after the expenditure of the said sum of $450,000 above mentioned."

VII.

The said Court erred in making and entering the following finding and holding contained in the decree:

> "That the second mortgage bonds of the Oregon-Washington Timber Company and the 400 railroad bonds collateral thereto were not used for future extensions, betterments or equipment for the railroad, but the interest of the Washington Northern Railroad Company therein was assigned and transferred, as hereinafter set forth, to the defendant William W. Crawford, trustee, subject, however, to the paramount lien and interest of the holders of the 600 railroad bonds aforesaid."

VIII.

The said Court erred in finding and decreeing that the true intent and agreement between the complainants and the mortgagors in the mortgages executed severally by the Washington Northern Railroad Company to the Mississippi Valley Trust Company and by the Oregon-Washington Timber Company to the Mississippi Valley Trust Company "was to and did convey all of the property, real, personal and mixed, of every kind and wheresoever situate, and all appendages and appurtenances thereto, and all of the equities of redemption, reversions, interests, liens, franchises, rights, privileges, immunities, claims and demands, as well in equity as in law, then owned, possessed or enjoyed, and which might hereafter be in any wise acquired, owned, possessed or enjoyed by the Washington Northern Railroad

Company or the Oregon-Washington Timber Company, notwithstanding that the same was not particularly set forth in said indentures and not particularly described therein."

IX.

The said Court erred in finding and decreeing that the so-called "after acquired property clause" contained in the mortgage executed by the Washington Northern Railroad Company to the Mississippi Valley Trust Company covered and included the [171] 400 railroad bonds numbered from 601 to 1000, inclusive, issued by the Washington Northern Railroad Company.

X.

The said Court erred in making and entering the following finding and holding contained in the decree:

> "On March 1, 1912, the Washington Northern Railroad Company, the Oregon-Washington timber Company, and the Blazier Timber Company, all of which said companies being then owned, dominated and controlled by the same set of people, and practially and in effect one company, pursuant to the unanimous resolution of the stockholders and board of directors of the said companies, executed and delivered to the defendant William W. Crawford, trustee, their mortgage deed of trust, whereby they transferred and conveyed to the said trustee the property of the railroad hereinbefore described and which prior thereto had been mortgaged to the Mississippi Valley Trust

Company as trustee, as hereinbefore found, under the mortgage of date June 4th, 1910, and the property of the timber company which had theretofore been mortgaged under its first mortgage of June 4th, 1910, to the Mississippi Valley Trust Company as trustee, and which is hereinbefore described and which has been mortgaged likewise by said timber company by its second mortgage of June 4, 1910, hereinbefore found, and the said railroad company, one of the mortgagors to said mortgage, undertook to and did assign to said Crawford, trustee, as part security under said mortgage, $400,000 of the second mortgage bonds of the timber company, issued under its said second mortgage, and $1,000,000 first mortgage bonds of the railroad company *as they should thereafter from time to time be released and delivered, or releasable and deliverable, by the Mississippi Valley Trust Company under the terms and provisions of the first and second mortgage deeds of trust, respectively, of the timber company to said Mississippi Valley Trust Company.*"

XI.

The said Court erred in making and entering the following finding and holding contained in the decree:

"That the effect of the assignment of the railroad bonds so made" (to William W. Crawford) "was to assign the same subject to the prior lien and claim of the holders of the 600 railroad bonds first issued, and to postpone the rights

of William W. Crawford, trustee, in the railroad security until after the said 600 railroad bonds had been fully paid and discharged."

XII.

The said Court erred in finding and decreeing that the mortgage executed by the Oregon-Washington Timber Company, the Washington Northern Railroad Company and the Blazier Timber Company to William W. Crawford, trustee, was subordinate and inferior **[172]** to the mortgages of June 4th, 1910, executed by the Washington Northern Railroad Company and by the Oregon-Washington Timber Company.

XIII.

The said Court erred in finding and decreeing that the assignment by the Washington Northern Railroad Company to William W. Crawford, trustee, of the $400,000 of first mortgage bonds of the Washington Northern Railroad Company, numbered from 601 to 1000, inclusive, was received and accepted by the said William W. Crawford, trustee, subject and inferior to the lien of the $600,000 of first mortgage bonds of the Washington Northern Railroad Company numbered from 1 to 600, both inclusive.

XIV.

The said Court erred in refusing to hold that the $400,000 of first mortgage bonds of the railroad company so assigned to the said William W. Crawford, trustee, under his mortgage of March 1st, 1912, were of equal standing and rank with the $600,000 of first mortgage bonds of said railroad company numbered from 1 to 600, both inclusive.

XV.

The said Court erred in finding and decreeing that the first mortgage executed by the Washington Northern Railroad Company to the Mississippi Valley Trust Company of June 4th, 1910, and the first mortgage of the Oregon-Washington Timber Company to the Mississippi Valley Trust Company of June 4th, 1910, were all executed and designed as security for one debt, to wit, the indebtedness of the Oregon-Washington Timber Company under its first mortgage of June 4th, 1910, in the sum of $600,000 represented by the 600 first mortgage bonds of the Oregon-Washington Timber Company and in holding that the bonds secured by the mortgage of March 1st, 1912, executed to William W. Crawford, trustee, by [173] the Washington Northern Railroad Company, the Oregon-Washington Timber Company and the Blazier Timber Company were and are junior and inferior to the $600,000 of first mortgage bonds of the Oregon-Washington Timber Company and the $600,000 first mortgage bonds of the Washington Northern Railroad Company numbered from 1 to 600, both inclusive.

XVI.

The said Court erred in decreeing that the sum of $33,250 was a reasonable sum to be allowed complainants for the services of their attorneys in this action.

XVII.

The said Court erred in decreeing that $1,500 was a reasonable sum to be allowed to the complainants for their services as trustees.

XVIII.

The said Court erred in holding and decreeing that the mortgage of June 4, 1910, executed to the Mississippi Valley Trust Company by the Washington Northern Railroad Company and the mortgage executed by the Oregon-Washington Timber Company to the Mississippi Valley Trust Company of June 4, 1910, should be foreclosed in the same action and cause.

XIX.

The Court erred in adjudging and decreeing that the proceeds of the sale of the property of the Oregon-Washington Timber Company should be applied in the following order:

1. To the payment of the costs of the said sale.
2. To the payment of the certificates of the Receiver of the Oregon-Washington Timber Company.
3. To the payment to Wallace McCamant, solicitor for complainants of the sum of $33,250, the attorney's fee adjudged to be due him for services rendered by him in this cause.
4. To the payment of the interest coupons maturing November 1, 1912, on the bonds of the Oregon-Washington Timber Company, of date June 4, 1910. **[174]**
5. To the payment of the mortgage debt aforesaid, to wit, the sum of $570,000 with interest thereon at the rate of 6% per annum from May 1, 1912, less the face of the coupons maturing November 1, 1912.
6. To the payment to E. S. McCord, solicitor for the

defendant, William W. Crawford, trustee, of the sum of $2,500, the attorney's fee allowed him for the foreclosure of the Crawford mortgage.

7. To the payment to William W. Crawford, trustee, of the sum of $453,591.67, with interest from the 20th day of February, 1915.
8. The overplus, if any, to be paid into court to be distributed in such manner as the Court may direct.

XX.

The Court erred in adjudging and decreeing that the proceeds of the sale of the properties of the Washington Northern Railroad Company should be applied as follows:

1. To the payment of the costs of said sale.
2. To the payment of the certificates of the receiver of the Washington Northern Railroad Company.
3. To the payment to Wallace McCamant, solicitor for complainants, of the sum of $33,250, the attorney's fee adjudged to be due him for services rendered by him in this cause.
4. To the payment of the coupons maturing November 1, 1912, on the bonds of the Washington Northern Railroad Company, of date June 4, 1910, numbered 1 to 600, less the 30 bonds which have been paid up and surrendered to said railroad company.
5. To the payment of the mortgage debt aforesaid, to wit, the sum of $570,000 with interest thereon at the rate of 6% per annum from

May 1, 1912, less the face of the coupons maturing November 1, 1912, on bonds 1 to 600, less the 30 bonds which have been paid and retired.

6. To the payment to E. S. McCord, solicitor for the defendant, William W. Crawford, trustee, of the sum of $2,500, the attorney's fee allowed him for the foreclosure of the Crawford mortgage.
7. To the payment to William W. Crawford, trustee, of the sum of $453,591.67, with interest from the 20th day of February, 1915.
8. The overplus, if any, to be paid into court, to be distributed in such manner as the Court may direct.

XXI.

The Court erred in refusing to hold that the proceeds of the sale of the properties of the Oregon-Washington *Timber* [175] *should* be applied *pro-rata* to the payment of the first mortgage bonds of the Oregon-Washington Timber Company numbered from 1 to 570, both inclusive, and that the equivalent to said sum to be applied *pro rata* to the payment of the first mortgage bonds of the Washington Northern Railroad Company, numbered from 1 to 570, both inclusive, and in refusing to hold that the proceeds of the sale of the properties of the Washington Northern Railroad Company, after the payment of the costs and receiver's expenses, should be applied upon the $400,000 of first mortgage bonds of the Washington Northern Railroad Company, represented by the said William W. Crawford, trus-

tee, to the extent and in an amount so that each of the bonds numbered from 601 to 1000, both inclusive, should receive a payment thereon equal to the payment on each of the bonds numbered from 1 to 570, both inclusive, and in refusing to hold that the first mortgage bonds of the Washington Northern Railroad Company numbered from 601 to 1000, both inclusive, are of equal rank with the bonds numbered from 1 to 570, both inclusive, of said Washington Northern Railroad Company; and in refusing to direct the application of the remaining proceeds of the sale of the properties of the Washington Northern Railroad Company *pro rata* upon all of the outstanding first mortgage bonds of the Washington Northern Railroad Company, numbered from 1 to 570, both inclusive, and from 601 to 1000, both inclusive; and in holding that the attorney's fee of $33,250 should be paid from the proceeds of the sale of the properties of the Washington Northern Railroad Company prior to the application of the proceeds of the sale of the properties of the Washington Northern Railroad Company upon the indebtedness, principal and interest, represented by said first mortgage bonds of the railroad company. **[176]**

XXII.

The said Court erred in holding and decreeing that the complainants were entitled to an attorney's fee of $33,250, payable twice, once out of the proceeds of the sale of the properties of the Oregon-Washington Timber Company and second payable out of the proceeds of the sale of the Washington Northern Railroad Company.

XXIII.

The Court erred in holding and decreeing that $33,250 was a reasonable attorney's fee to be allowed to the complainants for the foreclosure of the mortgage of the Oregon-Washington Timber Company, and in holding that the same sum was a reasonable sum for the foreclosure of the mortgage of the Washington Northern Railroad Company.

XXIV.

The Court erred in refusing to hold and decree that William W. Crawford, trustee, held a first and paramount lien upon the $400,000 of first mortgage bonds of the railroad company numbered from 601 to 1000, both inclusive, and in refusing to hold and decree that the said William W. Crawford held a first and paramount lien upon the $400,000 of second mortgage bonds of the Oregon-Washington Timber Company, numbered from 1 to 400, both inclusive, and in refusing to direct and decree a sale of said last-mentioned bonds.

XXV.

The said Court erred in holding that the property acquired by H. E. Collins, as receiver of the Washington Northern Railroad Company and described in the decree should be first sold and that the proceeds of the sale of said property should be applied to the payment of the receiver's certificates. [177]

XXVI.

The Court erred in adjudicating by its decree that the first mortgage given by the Oregon-Washington Timber Company under date of June 4, 1910, to the Mississippi Valley Trust Company secured the same debt as that evidenced by the mortgage and bonds of

the Washington Northern Railroad Company of date June 4, 1910.

XXVII.

The said Court erred in holding that the complainants were entitled to recover their costs and disbursements of the defendant William W. Crawford, trustee.

XXVIII.

The said Court erred in decreeing that $1,500 of the $4,500 paid to the Mississippi Valley Trust Company by the Oregon-Washington Timber Company, under the sinking fund provisions of the mortgage should be retained by the complainants for their use, and in holding that the remainder of said money be paid by the Mississippi Valley Trust Company to H. E. Collins to be applied by him *pro rata* on the indebtedness of the receivership.

XXIX.

The said Court erred in holding that under the provisions relating to after acquired property contained in the mortgage executed under date of June 4, 1910, by the Washington Northern Railroad Company to the Mississippi Valley Trust Company the Washington Northern Railroad Company acquired the $400,000 of first mortgage bonds of the railroad company numbered from 601 to 100, both inclusive, and that such bonds became subject and subordinate to the lien of the first mortgage bonds numbered from 1 to 600, both inclusive, described in said mortgage dated June 4, 1910. [178]

XXX.

The said Court erred in holding that it was the

intention of all of the parties at the time of the execution of the Crawford mortgage to make the security given for said mortgage subject to the $600,000 mortgage bonds sold and delivered by the Mississippi Valley Trust Company.

XXXI.

The said Court erred in holding and decreeing that certain timber lands acquired after the execution of the mortgage of June 4th, 1910, by the Oregon-Washington Timber Company to the Mississippi Valley Trust Company became subject to the lien of said mortgage.

KERR & McCORD,
Solicitors for Defendant and Cross-Complainant William W. Crawford.

(Acceptance of service.)
(Filed Aug. 13, 1915.) [179]

Stipulation (to Send Up Original Exhibits).

IT IS HEREBY STIPULATED between the parties hereto that the clerk of this court in making up his return to the citation on appeal herein shall include therein as a part of the record the originals instead of copies of the following exhibits:

Complainants' Exhibit No. 8, being a copy of the mortgage given by the Washington Northern Railroad Company to the Mississippi Valley Trust Company, dated June 4th, 1910.

Complainants' Exhibit No. 9, being a copy of the first mortgage given by the Oregon-Washington Timber Company to the Mississippi Valley Trust Company, dated June 4th, 1910.

Complainants' Exhibit No. 10, being a copy of the second mortgage given by the Oregon-Washington Timber Company to the Mississippi Valley Trust Company, dated June 4th, 1910.

Complainants' Exhibit No. 11, being a copy of the mortgage given by the Washington Northern Railroad Company, Oregon-Washington Timber Company and Blazier Timber Company to William W. Crawford, Trustee, dated March 1st, 1912.

Complainants' Exhibit No. 13, being the proposal of the Oregon-Washington Timber Company to the Washington Northern Railroad Company, of date June 4th, 1910, on the subject of the purchase of the bonds of the Washington Northern Railroad Company by the Oregon-Washington Timber Company, and the consideration for such bonds.

Complainants' Exhibit No. 15, being a statement of payments of principal and interest called for by complainants' mortgages prior to the bringing of the suit.

Complainants' Exhibit No. 16, being certain accounts shown by the books of the Washington Northern Railroad Company and the [180] Oregon-Washington Timber Company.

Complainants' Exhibit No. 17, showing entry on books of the Washington Northern Railroad Company of credit to first mortgage six per cent bond account, $1,000,000 bonds.

Complainants' Exhibits Nos. 18 and 19, being pages of the account book of the Washington Northern Railroad Company.

Complainants' Exhibit No. 29: File of letters from

Zane and Busby & Weber to J. E. Blazier.

Complainants' Exhibit No. 30: Letter and account.

Complainants' Exhibit No. 31: Contract between the Washington Northern Railroad Company and the Weist Logging Company.

Complainants' Exhibit No. 32: Statement of payments upon the Wiest Logging Company contract.

Complainants' Exhibit No. 33: Copy of the resolution authorizing the execution of the mortgage of June 4th, 1910, by the Oregon-Washington Timber Company to the Mississippi Valley Trust Company.

Complainants' Exhibit No. 34: Pages 59, 60 and 61 of Volume 3 of the Oregon-Washington Logging Company, afterwards the Oregon-Washington Timber Company.

Complainants' Exhibit No. 36, being certain pages of record book No. 4 of the Oregon-Washington Logging Company, afterwards the Oregon-Washington Timber Company.

Complainants' Exhibit No. 37, being extracts from the minute book of the Washington Northern Railroad Company.

Defendants' Exhibit "A": Extract from minute book of the Oregon-Washington Timber Company, being portion of the record showing the corporate action of the Washington Northern Railroad Company authorizing the execution of the mortgage of [181] March 1st, 1912, by the Washington Northern Railroad Company, the Oregon-Washington Timber Company and the Blazier Timber Company to William W. Crawford, trustee, containing copy

of said mortgage, being the same instrument as Complainants' Exhibit No. 11.

Defendants' Exhibit "B": Certain extracts from the corporate records, Volume 1, of the Washington Northern Railroad Company.

Defendants' Exhibit "C": Extract from the minute-book of the Washington Northern Railroad Company.

Defendants' Exhibit "D": Extract from the minute-book of the Washington Northern Railroad Company relating to the contract with the Weist Logging Company.

Defendants' Exhibit "G": Corporate records of the Blazier Timber Company, showing authorization for execution of the mortgage to William W. Crawford by the Blazier Timber Company.

Defendants' Exhibit "H": Corporate record of the Oregon-Washington Timber Company, showing authorization for execution of the mortgage to William W. Crawford by the Oregon-Washington Timber Company.

Defendants' Exhibit "A–1": Letter attached to depositions of Frederick Vierling and Samuel B. Blair, being letter dated June 6th, 1910, from James H. Grover to the trust department of the Mississippi Valley Trust Company.

Defendants' Exhibit "B–1": Letter dated June 4th, 1910, from the Oregon-Washington Timber Company to Messrs. Little & Hays.

Defendants' Exhibit "C–1": List of members of syndicate for purchase of bonds.

Defendants' Exhibit "D–1": Copy of mortgage of

Blazier [182] Timber Company, Oregon-Washington Timber Company and Washington Northern Timber Company and J. E. Blazier to Mississippi Valley Trust Company, trustee, filed for record April 4th, 1911, in Book "K" of Mortgages at page 139, records of Skamania County.

Defendants' Exhibit "E–1": Confirmatory mortgage.

Defendants' Exhibit "F–1": List of holders of first mortgage bonds deposited with Mississippi Valley Trust Company.

Defendants' Exhibit "G–1": Letter dated April 10th, 1912, from J. E. Blazier as President of the Washington Northern Railroad Company, Oregon-Washington Timber Company and Blazier Timber Company, and J. E. Blazier individually, to Mississippi Valley Trust Company.

SNOW & McCAMANT of
Solicitors for Complainants.
KERR & McCORD,
Solicitors for Defendant William W. Crawford.

(Filed Aug. 25, 1915.) [183]

Order for Sending Up Original Exhibits.

Agreeably to the written stipulation of the parties this day filed herein, and it being in the opinion of the presiding Judge undersigned deemed proper that the clerk of this court in making up his return to the citation on Appeal herein shall include therein as a part of the record the original instead of copies of certain exhibits, being the exhibits mentioned in said stipulation on file herein,

WHEREFORE, IT IS ORDERED that the said original exhibits which are particularly mentioned in said stipulation be sent up by the clerk of this court as a part of his return to the citation on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, instead of copies thereof.

Dated at Tacoma, Wn., this the 9th day of November, 1915.

EDWARD E. CUSHMAN,
United States District Judge for the Western District of Washington.

(Filed Nov. 9, 1915.) [184]

[Title of Court and Cause.]

[Certificate to Statement of Evidence and Order Making Same a Part of the Record.]

THIS IS TO CERTIFY: That the cross-complainant and appellant prepared a statement of evidence and duly lodged the same in the office of the clerk of this court; that the other parties to the action were duly notified of such lodgment, and the time and place given in such notice as to when the appellant would ask the Court to approve the statement, the time so named being more than ten days after such notice.

And this Court does further CERTIFY that after such notice was given and such statement of the evidence lodged with the clerk of this court, the Mississippi Valley Trust Company made certain objections and amendments and that by consent of both parties such amendments have been incorporated in the

statement of the evidence and that the statement of the evidence [185] is true, complete and properly prepared and that the parties have consented that the same is a true, complete, properly prepared and agreed statement of the evidence.

WHEREFORE, it is by the Court ORDERED, ADJUDGED AND DECREED that the annexed statement of the evidence attached hereto be and the same is hereby made a part of the record in this cause as the statement of the evidence in said cause and the same shall constitute a part of the record in said cause for the purpose of appeal.

DATED at Tacoma, Washington, this 2d day of November, 1915.

EDWARD E. CUSHMAN,
United States District Judge for the Western District of Washington. [186]

Transcript of Testimony.

[Testimony of Edward C. Wright, for Complainants.]

EDWARD C. WRIGHT, a witness produced on behalf of the complainants, being first duly sworn, testified as follows:

Direct Examination by Mr. McCAMANT.

In answer to interrogatories propounded by Mr. McCamant the witness testified that he was a member of the Bar of the States of Missouri, Kansas, Massachusetts and New York; that he had been in the practice of his profession for twenty-eight years; that his practice consisted practically of trust company and railroad business; that he was attorney for

(Testimony of Edward C. Wright.)

one of the complainants in the case at bar; that he was familiar with the property purchased by the Oregon-Washington Timber Company subsequent to June 4, 1910.

Over the objection of counsel for defendant and cross-complainant the witness testified that the Oregon-Washington Timber Company purchased and paid for the north half of the northeast quarter of section twenty-four, township three, range five east Willamette Meridian, and the south half of the north half of section nineteen, township two north, range six east, Willamette Meridian, and the north half and the north half of the south half of section thirty-one, township three north, range six east, Willamette Meridian, in Skamania County, Washington.

Witness further testified that there now remained in the hands of the Mississippi Valley Trust Company, trustee, in St. Louis, the sum of $4,500, paid in on account of the sinking fund. That the bonds secured by the mortgages represented by attorneys for complainants were held as follows: About one-third in Michigan; one-third in Missouri, and the other third scattered through Nebraska and Kansas. [187]

Witness further testified that the expenses of the Mississippi Valley Trust Company and the Union Trust Company in connection with the handling of their trust had been about $1,750, but that they were willing to accept the sum of $1,500; that witness

(Testimony of C. W. Fulton.)

considered that amount a very reasonable compensation.

Over objection of counsel for defendant and cross-complainant the witness stated that the legal questions involved in this case were complicated and close and necessitated a great amount of work; that a large sum of money was involved; that the bonds were distributed over a large area and a great many trips had to be made; that witness was compelled to go from Kansas City to Chicago twice and from Kansas City to St. Louis three times and also from Kansas City to Portland and Tacoma. That the case had taken witness away from his office for an aggregate period of seventeen days; that witness was obliged to ask Mr. McCamant to come from Portland to Kansas City and to St. Louis and that Mr. McCamant had made two eastern trips in response to these requests.

Cross-examination waived.

Witness excused. [188]

[Testimony of C. W. Fulton, for Complainants.]

C. W. FULTON, called as a witness on behalf of complainants, being first duly sworn, testified as follows:

Direct Examination by WALLACE McCAMANT, Esq.

In answer to interrogatories propounded by Mr. McCamant witness testified as follows: That he was an attorney at law and had been in the practice of that profession for over thirty-five years; that his practice had been confined to Washington and Ore-

(Testimony of C. W. Fulton.)

gon; that he was now engaged in a general practice in the city of Portland; that he was acquainted with what was generally considered a proper charge for legal services; that in the present case he thought that a fair and reasonable compensation for the services rendered would be five per cent on the debt and accrued interest.

Cross-examination by E. S. McCORD, Esq.

In answer to interrogatories propounded by Mr. McCord the witness testified that in naming five per cent upon the debt and accrued interest he had assumed that the security was at least equal to the amount of the indebtedness; that the adequacy or inadequacy of the security in the opinion of the witness would be immaterial in fixing an attorney's fee to be allowed in a decree, for as much as the mortgagor must be presumed to have tendered adequate security and the mortgagor and his successors in interest should not complain if the attorney's fee were based on the assumption that the security was adequate. That if the security proved inadequate such fact might call for a readjustment of the amount to be paid as between attorney and client, but could not in the judgment of the witness affect the amount reasonable to be allowed in a proceeding of this character. That in settling with their clients attorneys *attorneys* take into consideration the amount recovered. That in the foreclosure of a mortgage a point could be reached where five per cent would be too large an amount to charge, while in other cases it would be too [189] small; that in

(Testimony of C. W. Fulton.)

fixing a fee the amount involved and the question involved must be taken into consideration.

Redirect Examination by Mr. McCAMANT.

Over the objection of counsel for the defendant and cross-complainant the witness testified that he did not think there was any difference between the quantum of charges obtaining in the courts of Oregon and Washington; that he thought attorneys as a rule charged about the same in both states; that he had considerable business in the Federal Courts of Oregon.

Witness excused. [190]

[Testimony of A. B. Winfree et al., for Complainants.]

A. B. WINFREE was called as a witness on behalf of the complainants and having been duly sworn it was thereupon stipulated and agreed between counsel that A. B. Winfree, Robert Treat Platt and Samuel White would testify substantially to the same effect as the testimony given by C. W. Fulton; that they are residents of Oregon, and have had similar experience to that of Mr. Fulton.

Counsel for complainants then offered in evidence a copy of the mortgage given by the Washington Northern Railroad Company to the Mississippi Valley Trust Company on June 4th, 1910, and the same was received and filed in evidence and identified as "Complainants' Exhibit No. 8."

Counsel for complainants then offered in evidence a copy of the mortgage given by the Oregon-Washington Timber Company being the first mortgage

(Testimony of A. B. Winfree.)

given by the Oregon-Washington Timber Company to the Mississippi Valley Trust Company under date of June 4th, 1910.

Counsel for defendants objected to the offer of the exhibit on the ground that it is irrelevant, incompetent and immaterial, and as being an attempt on the part of the complainants to foreclose two mortgages in the same suit and as being a misjoinder of causes of action and a misjoinder of parties complainant and parties defendant.

Objection overruled, and document referred to received and filed in evidence and identified as "Complainants' Exhibit No. 9."

Counsel for complainants then offered in evidence a [191] copy of the second mortgage given by the Oregon-Washington Timber Company to the Mississippi Valley Trust Company on June 4th, 1910; and it was stipulated that the same was subject to the objection made to exhibit 9, with the same understanding that no objection was made on account of the exhibit offered being a copy.

The document referred to was received and filed in evidence and identified as "Complainants' Exhibit No. 10."

Counsel for complainant then offered in evidence copy of mortgage given by the Washington Northern Railroad Company, the Oregon-Washington Timber Company, and the Blazier Timber Company to William W. Crawford, Trustee, on March 1, 1912, and the same was received and filed in evidence and identified as "Complainants' Exhibit No. 11."

(Testimony of A. B. Winfree.)

Counsel for complainants then offered in evidence accepted proposal from the Oregon-Washington Timber Company to the Washington Northern Railroad Company, of date June 4th, 1910, on the subject of the purchase of the bonds of the Washington Northern Railroad Company by the Oregon-Washington Timber Company and the consideration for such bonds.

Objected to by counsel for defendant and cross-complainant as incompetent, irrelevant and immaterial, but not objected to on ground that it was a copy instead of the original.

Objection overruled and document referred to received and filed in evidence and identified as "Complainants' Exhibit No. 13." [192]

[Testimony of H. E. Collins, for Complainants.]

H. E. COLLINS, called as a witness on behalf of the Complainants, being first duly sworn, testified as follows:

Direct Examination, by Mr. WALLACE McCAMANT.

That he was receiver of the Oregon-Washington Timber Company and of the Washington Northern Railroad Company, under appointment by the United States District Court for the Western District of Washington; that he was connected with these corporations prior to his appointment as receiver, first as representative of the first mortgage bondholders of the corporations, and later as secretary; that he was familiar with the properties

(Testimony of H. E. Collins.)

involved in the present litigation; that the railroad owned by the Washington Northern Railroad Company consisted approximately of twenty-five miles of track extending from Brindle on the Columbia River up into the timber of the Oregon-Washington Timber Company and the Blazier Timber Company; that the road is not now operating; that part of the lines have been taken up; that in his opinion the road could not be operated except as an entirety, it having been constructed for the purpose of transporting the timber of the Oregon-Washington Timber Company to the Columbia River, and was the only means of getting that timber to market,—that it did not connect with any other artery of commerce except the Columbia River.

Witness stated that he was familiar with the state of accounts between the Oregon-Washington Timber Company and the Washington Northern Railroad Company on the one hand, and the Mississippi Valley Trust Company and the Union Trust Company on the other with reference to the mortgages of June 4th, 1910; that [193] he had prepared a statment showing payments of principal and interest called for by these mortgages prior to the bringing of this suit.

Statement offered in evidence. Objected to by counsel for defendants and cross-complainant as incompetent, irrelevant and immaterial and not the best evidence. Objection overruled. Statement received in evidence and marked "Complainants' Exhibit No. 15." The books from which said statement

(Testimony of H. E. Collins.)

was prepared were present before the examiner at the time the statement was offered in evidence.

Over objection of counsel for defendants and cross-complainant witness stated that he had heretofore examined the books of account of the Oregon-Washington Timber Company and the Washington Northern Railroad Company; that the books of the Washington Northern Railroad Company showed the payment of interest on bonds dated June 4th, 1910, up to the payment due November 1st, 1912, but did not show payment due November 1st, 1912, amounting to $17,100, nor payment of like amount due May 1st, 1913. That all interest payments of the Oregon-Washington Timber Company were accounted for on the books of the Washington Northern Railroad Company.

That the books of the Oregon-Washington Timber Company under an account entitled "Mississippi Valley Trust Company Bond Account" showed a payment on January 30th, 1913, of $30,000 of first mortgage bonds of the timber company, due May 1st, 1912; that said sum of $30,000 was the entire amount shown by the books of the Oregon-Washington Timber Company or the Washington Northern Railroad Company as paid on account of principal.

Copy of above account offered and received in evidence, and identified as "Complainants' Exhibit No. 16."

Witness further stated that the books of the Washington Northern Railroad Company showed a credit to first mortgage six per cent bond account,

(Testimony of H. E. Collins.)

under date of July 1st, 1910, of $1,000,000 bonds. [194]

Copy of page of book referred to, identified by witness, offered and received in evidence and marked "Complainants' Exhibit No. 17."

By agreement of counsel for defendants and cross-complainant a copy of the pages of the record of the Washington Northern Railroad Company covering the matter of the payment of interest on the mortgages of June 4th, 1910, identified by the witness, was offered and received in evidence and marked "Complainants' Exhibits Nos. 18 and 19."

Witness thereupon stated that no payments had been made except as shown by the above-mentioned books, either on account of principal or interest of the mortgages of June 4th, 1915.

That he was in the office of the two companies on the 1st of November, 1912, and the 1st of May, 1913, and that the interest installments falling due on those dates were not paid because the companies were unable to make them; that no payments were made on account of the principal, nor into the sinking fund called for by either of the mortgages, except as shown by the books offered in evidence. That he was familiar with the financial condition of the Washington Northern Railroad Company and the Oregon-Washington Timber Company in the month of September, 1913; that in addition to the default on account of the principal and interest on the mortgages there were unsecured debts approximating $75,000 in amount, principally the debts of

(Testimony of H. E. Collins.)

the Washington Northern Railroad Company; that the debts were practically all past due; that the creditors were pressing for their money and there were no funds with which to pay them; that there was approximately $5,000 due for labor in addition to the $75,000; that as receiver he had paid this $5,000 from funds realized from a loan authorized by the Federal Court.

Over the objection of counsel for defendants and cross-complainant witness testified that the relations of the Washington [195] Northern Railroad Company and the Oregon-Washington Timber Company were very close; that the same persons were officers and directors of the two companies, and that at least three-fourths of the capital stock of the two companies was owned by the same individuals. That the traffic of the Washington Northern Railroad Company consisted exclusively of the timber of the Oregon-Washington Timber Company, the Blazier Timber Company and the timber on one or two small tracts which were later acquired by the railroad company.

Over the objection of counsel for defendants and cross-complainant, witness testified that the accounts of the two corporations were in confusion as to moneys paid out by one which should have been paid by the other, so much so that no account had ever been rendered as between the two corporations since January 1st, 1911. That the operation of the Oregon-Washington Timber Company would not have been possible without the operation in connection

(Testimony of H. E. Collins.)

with it of the Washington Northern Railroad Company; that the Washington Northern Railroad Company is the only means available of getting to market the timber of the timber company.

Witness stated that he was acquainted with J. E. Blazier; that said Blazier was in St. Louns in September, 1913; that the executive officer of the two mortgagor companies at that time was Engene Blazier, brother of J. E. Blazier. That he was in the office of the two companies at the time the mortgage given to William W. Crawford was placed upon the property described in the bill of complaint and the cross-bill and when the negotiations were had leading up to the making of the loan; that the Assets Realization Company of Chicago, floated the bond issue; that Messrs. Zane, Busby & Weber represented them in the investigations preliminary to the making of the loan; that their offices were in the First National Bank Building, Chicago, Iillinois; that Harry P. Weber had the matter in [196] hand; that he was familiar with the signature of Mr. Weber; that the signature to the letter of March 26, 1912, purporting to have been written by Harry P. Weber to witness and letter of same date purporting to have been written by Zane, Busby & Weber by Harry P. Weber to J. E. Blazier, and a third letter of date March 26, 1912, purporting to have been written by Zane, Busby & Weber by Harry P. Weber to J. E. Blazier, with a postscript thereto signed H. P. W. was the signature of Harry P. Weber, and that the carbon copy of a letter dated March 31st, 1912, purporting to have been written by the witness

(Testimony of H. E. Collins.)

to Harry P. Weber was in fact written by witness; that witness wrote the letter of March 31st, 1912, addressed it to the correct address of Mr. Weber and mailed it. That he received the record books referred to in the letter of March 26, 1912, written by Zane, Busby & Weber to J. E. Blazier; that these record books included the original record books of the Washington Northern Railroad Company.

The file of correspondence identified by witness offered in evidence. Objected to by counsel for defendant and cross-complainant as incompetent, irrelevant and immaterial, and as not properly identified. Objection overruled. File of letters referred to received and filed as one exhibit, identified as "Complainants' Exhibit No. 29."

Over objection of counsel for defendants and cross-complainant, witness stated that the record books of the Washington Northern Railroad Company and the Oregon-Washington Timber Company were in the possession of Zane, Busby & Weber for about a month prior to March 26th, 1912.

Witness identied the signature of Edward Ridgely, vice-president of the Assets Realization Company upon a letter written by the Assets Realization Company of date April 17th, 1912; that said letter when received at the office of the Oregon-Washington Timber Company and the Washington Northern Railroad Company contained the enclosures now attached thereto; that the notes referred [197] to in the first item of the account dated April 17, 1912, were the notes entitled first and general lien

(Testimony of H. E. Collins.)

first mortgage six per cent gold notes, executed March 1st, 1912, by the Oregon-Washington Timber Company, the Blaizier Timber *Timber* Company and the Washington Northern Railroad Company amounting to $425,000; that the account attached to the letter just identified by witness is the account reported by the Assets Realization Company to the trustees of the Crawford loan, and has been in the possession of the mortgagor corporation since that date.

Letter and account identified by witness offered in evidence. Objected to by counsel for defendants and cross-complainant, as incompetent, irrelevant and immaterial, and not the best evidence. Objection overruled. Documents received and filed in evidence, marked "Complainants' Exhibit No. 30."

Witness then testified that he had in his possession the contract entered into by the Washington Northern Railroad Company with the Weist Logging Company with reference to the purchase of logging material, and produced same and identified the signatures thereto, with exception of the witnesses, as genuine.

Contract offered in evidence and received and filed, and identified as "Complainants' Exhibit No. 31."

Witness stated that he was familiar with the payments that had been made on the contract with the Weist Logging Company by the Washington Northern Railroad Company; that he had prepared a statement of such payments, and identified the state-

(Testimony of H. E. Collins.)

ments handed him by counsel.

Statement offered in evidence. Objected to by counsel for defendants and cross-complainant as incompetent, irrelevant and immaterial. Objection overruled. Statement received and filed in evidence and identified as "Complainants' Exhibit No. 32."

Witness then stated that he personally knew these payments had been made and that they were made with the funds of the Washington Northern Railroad Company. [198]

Over objection of counsel for defendants and cross-complainant, witness testified that the rights of the Washington Northern Railroad Company in that contract with the Weist Logging Company had not to his knowledge been assigned to anyone; that the equipment covered by that contract was now in Skamania County, Washington, in the custody of the receiver of the Washington Northern Railroad Company; that some of it was on the property of the Washington Northern Railroad Company and some of it on the property of the Blazier Timber Company, and that two engines he believed to be in some other place.

Upon request of counsel witness produced the record books of the directors' and stockholders' meetings of the Oregon-Washington Timber Company.

Counsel for complainants offered in evidence so much of the books identified by witness as was sufficient to show the corporate action taken with a view of authorizing the execution of the mortgage of June 4th, 1910, by the Oregon-Washington Timber Com-

(Testimony of H. E. Collins.)

pany to the Mississippi Valley Trust Company, and the fact that the parties participating in the stockholders' meeting passing on that question were in fact the stockholders of the corporation and all of the stockholders, and the further fact that those who participated in the directors' meeting purporting to authorize the execution of that mortgage were in fact directors of the corporation.

Objected to by counsel for defendants and cross-complainant on the ground that the same is too indefinite and uncertain and gives no understanding as to what particular records are offered in evidence, necessitating the passing on the question by someone as to what records do bear upon the fact as indicated by counsel. Objection overruled, and documents referred to received in evidence and identified as "Complainant's Exhibit No. 33."

Counsel for complainants offered in evidence pages 59, 60 and 61 of Volume 3 of the Oregon-Washington Logging Company, afterward [199] the Oregon-Washington Timber Company, and asked leave to substitute a copy in lieu of the original, which was agreed to by counsel for defendant and cross-complainant.

Pages referred to received in evidence and identified as "Complainants' Exhibit No. 34."

Counsel for complainants offered in evidence certain pages of record book No. 4 of the Oregon-Washington Logging Company, afterwards the Oregon-Washington Timber Company.

Pages referred to received and filed in evidence

(Testimony of H. E. Collins.)

and identified as "Complainants' Exhibit No. 36."

Counsel for complainants offered in evidence extracts from the minute-book of the Washington Northern Railroad Company.

Received and filed in evidence and identified as "Complainants' Exhibit No. 37."

Cross-examination by E. S. McCORD, Esq., of Counsel for Defendant and cross-complaint, William W. Crawford.

Counsel for defendant and cross-complainant offered in evidence extract from minute-book of the Oregon-Washington Timber Company, being portion of the record showing the corporate action of the Washington Northern Railroad Company authorizing the execution of the mortgage of March 1st, 1912, by the Washington Northern Railroad Company, the Oregon-Washington Timber Company and the Blazier Timber Company to William W. Crawford, Trustee, and containing a copy of said mortgage.

Received and filed in evidence and identified as Defendant's Exhibit "A."

Counsel for defendant and cross-complainant offered in evidence certain extracts from the corporate records,—Volume 1 [200] of the Washington Northern Railroad Company.

Received in evidence and identified as Defendant's Exhibit "B."

Counsel for defendant and cross-complainant offered in evidence certain extracts from the record book of the Washington Northern Railroad Company.

(Testimony of H. E. Collins.)

Objected to by counsel for complainants as incompetent, irrelevant and immaterial and as having no bearing on the issues raised by the pleadings. Objection overruled and documents received in evidence and identified as Defendant's Exhibit "C."

Counsel for defendant and cross-complainant offered in evidence extract from the minute-book of the Washington Northern Railroad Company, relating to the contract with the Weist Logging Company.

Received in evidence and identified as Defendant's Exhibit "D."

Counsel for defendant and cross-complainant offered in evidence the corporate records of the Blazier Timber Company, showing authorization for execution of mortgage to William W. Crawford.

Received in evidence and identified as Defendant's Exhibit "G."

Counsel for defendant and cross-complainant offered in evidence corporate records of the Oregon-Washington Timber Company showing authorization for execution of mortgage to William W. Crawford.

Received in evidence and identified as Defendant's Exhibit "H."

The witness thereupon, in answer to interrogatories propounded by counsel for defendant and cross-complainant, testified as follows:

That he was not Secretary of the Blazier Timber Company at the time of the execution of the Crawford mortgage, and was [201] not now, and was

(Testimony of H. E. Collins.)

not familiar with the records of that company; that he was secretary of the company for about three months prior to September 4th, 1913; that he was familiar with the account books of the company; that one payment of $30,000 had been made on account of the Crawford mortgage, which should have been credited to the Blazier Timber Company; that it was paid by draft sent by the Oregon-Washington Timber Company to the Assets Realization Company or to Mr. Crawford. That the $30,000 was paid on account of principal and as witness recalled it there was $12,700 paid on account of interest. That the floating indebtedness of the Blazier Timber Company at the time of the filing of the cross-bill was, outside of taxes, $1,400 to the United States Steel & Wire Rope Company or the United States Wire & Steel Company. That he had not found any executed contract or bill of sale executed by the Washington Northern Railroad Company to the Oregon-Washington Timber Company covering the Weist Logging Company's contract with the railroad company; that he had found an unexecuted copy attached to the minutes of the meeting of the directors of the corporation, authorizing the contract; that at the time the authorization was made the railroad company was unable to meet the purchase price, but that he did not know whether or not the Weist Logging Company was about to take back the property.

Over objection of counsel for complainants witness stated that he did not recall ever seeing or hearing anything about a written notice or demand on

(Testimony of H. E. Collins.)

the part of the Weist Logging Company to take back the property. That he had the records of the Washington Northern Railroad Company and would endeavor to find such notice. That the property of the Weist Logging Company was in his possession or custody, but he didn't know whether or not he had the right to it. That it was assessed to the Oregon-Washington Timber Company.

Witness stated that he did not know whether the $149,150.42, referred to in the letter written by the Assets Realization [202] Company to J. E. Blazier was paid over to the Mississippi Valley Trust Company; that the only amount he knew anything about was the net amount received by the companies at Portland, forwarded by the Assets Realization Company as the net amount received from that loan. That he thought the books of the company showed that payments were made to the various parties named in the statement attached to the letter dated April 17th, 1912; that he did not know for what purpose they were made or in payment of what indebtedness, as it was all done from the Chicago office. That all he knew was that the $45,439.68 was the net money received here after everything else had been taken care of at Chicago. That neither of the sums mentioned in Complainants' Exhibit No. 15 had been paid, that the statement simply shows the payments in default on September 1st, 1913. That one payment of $30,000 had been made. That the bonds of the Oregon-Washington Timber Company, 1 to 30 both inclusive were cancelled on account of that pay-

(Testimony of H. E. Collins.)

ment; that as he understood it, $30,000 of first mortgage bonds of the Washington Northern Railroad Company were up as collateral and that $30,000 in bonds were cancelled on account of that payment; that when the $30,000 in bonds of the timber company were paid that released $30,000 in bonds that the railroad company held as collateral for the bonds in like amount of the timber company.

Over objection of counsel for complainants witness testified that the stock of the Washington Northern Railroad Company was give as a bonus with the purchase by eastern parties of the $600,000 of bonds in June, 1910; that he did not know who were the holders of these bonds. That the entire capital stock of the railroad company went as a bonus to the purchasers of the bonds. That the stock was held until about January 30th, 1911.

Over objection of counsel for complainants, witness testified that at the time of the negotiations for the bonds secured by the Crawford mortgage there were outstanding on the properties of the Blazier Timber Company, the Oregon-Washington Timber Company and the Washington Northern Railroad Company bonds in the sum of [203] $150,000, or more, of so called "Series B" notes, secured by mortgage; that he did not know whether these "Series B" notes were paid out of the proceeds of the sale of the Crawford bonds, that the matter was attended to in the east. That in the books of the Oregon-Washington Timber Company there was an account with the Mississippi Valley Trust Company, but not

(Testimony of H. E. Collins.)

in the books of the Washington Northern Railroad Company. That he had no account in the books of the Oregon-Washington Timber Company with the members of the syndicate, Mr. Hays and other underwriters of the bonds and that their names did not appear in the books of that company as being entitled to any aount, nothing as witness recalled it but a few incidental payments on account of expenses for a trip from the east out here.

The witness further testified that Little & Hays had originally been a corporation, but were a partnership in the month of June, 1910, consisting of William P. Little and Frank P. Hays; that Mr. Little is now dead; that subsequent to June, 1910, the partnership was dissolved and the business was transacted as a corporation; that witness was not advised as to how the stock was held; he did know that neither Mr. Little nor Mr. Hays was a stockholder in the Mississippi Valley Trust Company in June, 1910, or at any other time; that John A. Prescott became interested in the bonds secured by mortgages executed on the 4th of June, 1910, several months after June, 1910.

Witness excused. [204]

[Testimony of Frederick Vierling, for Complainants.]

FREDERICK VIERLING, being called as a witness for the complainants, being first duly sworn, testified as follows:

Direct Examination by EDWARD C. WRIGHT, Esq.

In answer to interrogatories propounded by Mr. Wright the witness testified: That he resided at St. Louis, Missouri; was vice-president and trust officer of the Mississippi Valley Trust Company, which was incorporated October 3d, 1890, under the laws of the State of Missouri. That the company had some business with the Washington Northern Railroad Company and the Oregon-Washington Timber Company having become trustee under certain mortgage deeds of trust executed by those companies; that at one time the Trust Company had possession of all the bonds of the railroad company and the timber company, which were subsequently authenticated and then delivered under the respective mortgages; that the $1,000,000 of bonds of the Washington Northern Railroad Company were pledged as collateral under the mortgage of the Oregon-Washington Timber Company, and remained in the custody of the Trust Company; that the Trust Company originally received $1,000,000 of the bonds in pledge and had since delivered $30,000, leaving in the hands of the Trust Company at the present time $970,000 par value; that both the companies were in default; that the Trust Company referred the matter to Messrs. Snow &

(Testimony of Frederick Vierling.)

McCamant, attorneys [205] in State of Oregon, with authority to serve notice as to default and bring legal proceedings.

Cross-examination by H. P. WEBER, Esq.

Upon cross-examination in answer to interrogatories propounded by Mr. Weber, the witness testified:

That he was elected trust officer of the Mississippi Valley Trust Company in 1897, and had been such trust officer continuously since that date. That the $1,000,000 par value of the bonds of the Washington Northern Railroad Company were deposited with the Trust Company as security for the bonds of the Oregon-Washington Timber Company; that there were two issues of the timber company bonds, a first mortgage bond issue of $600,000 and a second mortgage bond issue of $400,000; that the $1,000,000 mortgage bonds of the Washington Northern Railroad Company were all first mortgage bonds and $600,000 par value of the railroad company bonds were deposited as collateral security for the $600,000 first mortgage bonds of the Oregon-Washington Timber Company and $400,000 of the railroad company bonds deposited as security for the $400,000 second mortgage bonds of the timber company, all of the above bonds being dated June 4th, 1910, and all issued about that time according to recollection of witness; that the entire issue of the bonds of the Washington Northern Railroad Company was deposited with the Mississippi Valley Trust Company as trustee as collateral security for the first and second mortgage bonds of

the Oregon-Washington Timber Company, $600,000 in the one case and $400,000 in the other.

[Stipulation of Fact as to Use of Bonds.]

It was stipulated and agreed by the respective counsel for complainants and defendants that the following are the facts [206] with respect to the use and intention concerning the use of the bonds of the Washington Northern Railroad Company:

That these bonds were issued solely as collateral for the bonds of the Oregon-Washington Timber Company, $600,000 in amount, being bonds 1 to 600, inclusive, as collateral security for the $600,000 first mortgage bonds of the Oregon-Washington Timber Company; $400,000 in amount, being bonds 601 to 1000, inclusive, face value, as collateral security for the $400,000 second mortgage bonds of the Oregon-Washington Timber Company. That at the time of the certification and issuance of the $600,000 first mortgage bonds of the Oregon-Washington Timber Company there was executed and issued by the Washington Northern Railroad Company and certified to by the Mississippi Valley Trust Company, as trustee, a single temporary first mortgage bond in the amount face value of $1,000,000; that on or about January 30th, 1911, two series of notes, "Series A" in the aggregate amount of $100,000 and "Series B" in the aggregate amount of $150,000; that "Series A" notes were executed by the Oregon-Washington Timber Company, the Washington Northern Railroad Company, the Blazier Timber Company and by J. E. Blazier, E. J. Blazier and Eugene Blazier. That "Series B" notes were executed by the three

(Testimony of Frederick Vierling.)

above-named companies and J. E. Blazier; that these two series of notes were secured by a mortgage deed of trust executed by the three above-named companies and J. E. Blazier to the Mississippi Valley Trust Company, trustee, covering all of the property of the Blazier Timber Company, and the $400,000 second mortgage bonds of the Oregon-Washington Timber Company, which in turn were secured by the $400,000 first mortgage bonds of the Washington Northern Railroad Company. That at the time of the issuance of these notes no change was made in the $1,000,000 temporary bond of the Washington Northern Railroad Company. That in the latter part of April or early part of May, 1912, these two series of notes were paid and the mortgage deed of trust securing [207] the same, together with a confirmatory mortgage dated January 26th, 1912, executed by the Blazier Timber Company to the Mississippi Valley Trust Company as trustee was released and discharged of record, and at about the same time the Washington Northern Railroad Company, the Oregon-Washington Timber Company and the Blazier Timber Company executed and issued their joint and several negotiable coupon notes, aggregating the principal sum of $425,000, and as security for the payment of these notes executed a mortgage deed of trust to William W. Crawford, trustee; and about the same time and for the purpose of the last-named note issue, the Washington Northern Railroad Company executed 1000 of its bonds, numbered 1 to 1000 inclusive, aggregating the prin-

(Testimony of Frederick Vierling.)

cipal sum of $1,000,000, which were deposited with the Mississippi Valley Trust Company as trustee in lieu of the $1,000,000 temporary bond, previously executed by the railroad company as above stated. These 1000 bonds of the railroad company were certified by the Mississippi Valley Trust Company as trustee, and used as follows: 600 of the bonds were bonds numbered one to 600, both inclusive and were deposited with and held by the Mississippi Valley Trust Company as collateral security for the $600,000 first mortgage bonds of the Oregon-Washington Timber Company; bonds numbered 601 to 1000, inclusive, were deposited with and held by the Mississippi Valley Trust Company as trustee, as security for the $400,000 second mortgage bonds of the Oregon-Washington Timber Company, which were conveyed, transferred, pledged and assigned to William W. Crawford, under the mortgage deed of trust to him to secure the $425,000 note issue hereinbefore mentioned.

The witness then stated that as trustee under the mortgage it was the duty of the Mississippi Valley Trust Company to authenticate and deliver the $600,000 first mortgage bonds on the order of the Oregon-Washington Timber Company; that said bonds were delivered under the terms of the purchase contract dated June 4th, 1910, between the Oregon-Washington Timber Company and the [208] Little & Hays Investment Company; that the records of the trust company showed that the sum of $546,000, representing the proceeds of the sale of the $600,000

(Testimony of Frederick Vierling.)

first mortgage bonds of the Oregon-Washington Timber Company, was deposited with the financial department of the Mississippi Valley Trust Company to the credit of the Washington Northern Railroad, and that this money was checked out as directed by the bond officer of the Mississippi Valley Trust Company in a communication by him, dated July 6th, 1910, addressed to the trust department; that defendant's Exhibit "A–1" is a true copy of said communication.

Counsel for complainants moved to strike that portion of the answer relating to the disposition of the proceeds of the sale of the $600,000 first mortgage bonds of the Oregon-Washington Timber Company, as well as Defendant's Exhibit "A–1."

Motion denied.

The following agreement was entered into by and between the respective counsel:

Agreement as to Certain Bonds.

It is agreed and understood that these bonds were delivered to J. E. Blazier, president of the Oregon-Washington Timber Company, in person, as per terms of proposal of June 4th, 1910, addressed to Messrs. Little & Hays, of St. Louis, Missouri, a true copy of this proposal being hereto attached and marked Defendant's Exhibit "B–1."

The witness then stated that he did not know and his records would not tell to whom these bonds were delivered by Mr. J. E. Blazier after their certification and delivery by the trust company to him; that Defendant's Exhibit "B–1" was the only agreement

(Testimony of Frederick Vierling.)

the trust company had concerning this matter. [209]

Referring to the syndicate mentioned in the two mortgages of the Oregon-Washington Timber Company and the mortgage of the Washington Northern Railroad Company, as the purchaser of the $600,000 first mortgage bonds of the Oregon-Washington Timber Company the witness testified that Defendant's Exhibit "C–1" attached herewith is a true and correct list of the members of the syndicate and the amounts subscribed by each member.

Counsel for complainants objected to this and moved to strike the exhibit from the files on the ground that it was irrelevant and immaterial, and not responsive to any of the issues made from the amended pleadings in the cause. Motion denied.

Witness further testified that the records of the trust department of the Mississippi Valley Trust Company did not show that $50,000 of the proceeds of the sale of the first mortgage bonds of the Oregon-Washington Timber Company was loaned to said company on its notes and that the records of the trust department of the trust company did not show that at the time the bonds of the Oregon-Washington Timber Company were deposited with the Trust Company there was also deposited certificates of stock for 9923 shares out of a total of 10,000 shares of the capital stock of the Washington Northern Railroad Company; that the records of the Trust Company did not show anything as to the disposition of the proceeds of the "Series A" notes and as to the payment of these notes, nor of the "Series B" notes.

Upon request of counsel for defendant and cross-complainant the witness agreed to attach to his deposition a true copy of the mortgage deed of trust dated January 30, 1911, and of the confirmatory mortgage of January 26, 1912, given to secure "Series A" and "Series B" notes, and the following stipulation was entered into:

[Stipulation as to Defendants' Exhibits "D–1" and "E–1."]

"It is hereby stipulated and agreed that attached hereto as Defendant's Exhibits 'D–1' and 'E–1' are a true copy respectively of the mortgage deed of trust, dated January 30, 1911, and of the confirmatory mortgage of [210] January 26, 1912, given to secure 'Series A' and 'Series B' notes hereinabove mentioned, and that copies may be used in lieu of the originals."

Mr. Wright, of counsel for complainants, objected to the relevancy of instruments "D–1" and "E–1" as not being responsive to any of the issues made by the amended pleadings in this case.

Witness further testified as follows: That the Mississippi Valley Trust Company was the depository, under a certain protective agreement dated June 12th, 1913, for the holders of the first mortgage bonds of the Oregon-Washington Timber Company; that some of the bonds had been deposited with the trust company under that agreement, and agreed to furnish a list of the names, addresses and amounts so far as possible, of the holders of the bonds under the agreement.

[Stipulation as to List of Bondholders.]

Mr. WEBER.—It is stipulated and agreed that a correct list of said bondholders, with their addresses and amount of bonds is set forth in Defendant's Exhibit "F–1" hereto attached and made a part hereof.

Counsel for complainants moved to strike said stipulation from the record and asked the Court to disregard the same as irrelevant and not responsive to any of the issues made by the amended pleadings in this case. Motion denied.

Witness further stated that the Mississippi Valley Trust Company had not qualified under the laws of the State of Washington to do business in said state and to hold title to property therein. That during the negotiations in Oregon and Washington looking to the issuance of the bonds of the timber company and the railroad company Mr. James H. Grover, then bond officer of the trust company, represented that company, and superintended and directed all of the proceedings. That the Oregon-Washington Timber Company made some payments into the sinking fund, as required by the terms of its mortgage to the Mississippi Valley Trust Company and made some of the quarterly statements called for, but not regularly; that he could not say from recollection how many quarterly statements were made. That there had been some correspondence about accounts between the Mississippi [211] Valley Trust Company and the Oregon-Washington Timber Company, as to the method of keeping maintenance and construction accounts; that witness did not consider Mr. H. E. Col-

(Testimony of Frederick Vierling.)

lins the representative of the trust company in Oregon; that he went out to Oregon along about June, 1910, soon after the bonds were negotiated with Little & Hays as the representative of the syndicate, and had been there ever since in that capacity.

Witness further stated that he did not think any officer or employee of the Mississippi Valley Trust Company was interested in the Columbia River & Bald Mountain Railroad Company; that he thought that Mr. Stockton had lately become interested in the Washougal Gold & Copper Mining Company; that Mr. Stockton was a director of the Mississippi Valley Trust Company.

Over the objection of counsel for complainants, the witness stated, in response to a question as to whether any arrangement, agreement or effort had been made to procure a release by the Mississippi *Valley Company* of the first mortgage of the Oregon-Washington Timber Company over the land of that company for the benefit of the Columbia River & Bald Mountain Railroad Company, or any agreement, arrangement or effort to procure a connection between the Washington Northern Railroad Company and the Columbia River & Bald Mountain Railroad Company by which the Washington Northern Railroad Company was to be connected with and used in conjunction with the Columbia River & Bald Mountain Railroad, that he remembered only that the Trust Company, as trustee, would of course make such releases as the parties interested would desire,—that he did not know that it was for the pur-

(Testimony of Frederick Vierling.)

pose indicated, or that such attempt was made; that only a verbal request for such release had been made; that he did not know of any attempt of any kind to use the property of the Washington Northern Railroad Company in connection with or as a part of any other railroad in Skamania County, except as above referred to. **[212]**

Witness further testified that he had in his files a communication dated April 10th, 1912, addressed to the Mississippi Valley Trust Company, St. Louis, Missouri, and signed by J. E. Blazier as president of the Washington Northern Railroad Company; as president of the Oregon-Washington Timber Company, as president of the Blazier Timber Company, and for individuals, and agreed to produce same.

The following stipulation was entered into:

[Stipulation as to Defendants' Exhibit "G–1."]

"It is stipulated and agreed that a true copy of said communication is hereto attached and marked Defendant's Exhibit 'G–1' and that this copy may be introduced in evidence and used in lieu of the original; subject to objection as to relevancy."

Witness excused.

[212a]

[Testimony of Samuel B. Blair, for Complainants.]

SAMUEL B. BLAIR, being called as a witness for the complainants, being first duly sworn, testified as follows:

Direct Examination by EDWARD C. WRIGHT, Esq.

In answer to interrogatories propounded by Mr. Wright the witness testified as follows: That he resided at St. Louis, Missouri; was connected with the trust department of the Mississippi Valley Trust Company and had been for eight years; that he was with the company in April, 1913; that the two series of notes made by the Oregon-Washington Timber Company, the Washington Northern Railroad Company, the Blazier Timber Company and three individual Blaziers, known as "Series A" and "Series B" notes were cancelled, sent to Chicago and cremated; that he checked up the notes at the time they were sent to Chicago; that they were sent to Chicago on April 5th, 1913.

Cross-examination by HARRY P. WEBER, Esq.

In answer to interrogatories propounded to him by Mr. Weber, the witness testified: That he knew nothing about the payment of the series of notes referred to in his direct testimony; that his records did not show anything about their payment,—that that part of the transaction went through the financial department of the Trust Company, with which witness was not connected; that he had no access to the records of that department; **[213]** that the records of the financial department were in charge of

(Testimony of Samuel B. Blair.)

the secretary of the company, Mr. J. E. *Brock,* a member of the syndicate that purchased the first mortgage bonds of the Oregon-Washington Timber Company.

Witness excused. **[214]**

[Stipulation as to Corporate Records.]

IT IS STIPULATED That the corporate records of the Washington Northern Railroad Company and the Oregon-Washington Timber Company show due authority for the execution of the mortgage by the Washington Northern Railroad Company and the Oregon-Washington Timber Company to the Mississippi Valley Trust Company under date of June 4th, 1910; and that the corporate records of the Oregon-Washington Timber Company, the Washington Northern Railroad Company and the Blazier Timber Company show due authority for the execution by said companies of the mortgage of March 1st, 1912, to William W. Crawford, trustee.

(Filed Nov. 2, 1915.) **[215]**

Stipulation (as to the Evidence).

WHEREAS, William W. Crawford, defendant and cross-complainant, has appealed from the decree in the above-entitled cause; and,

WHEREAS, the parties are desirous of minimizing the expense of the appeal by eliminating from the record so much thereof as does not bear upon the questions relied upon on the appeal; and.

WHEREAS, a stipulation has been entered into

by complainants indicating the exhibits which are to be taken up on appeal;

NOW, THEREFORE, IT IS STIPULATED AND AGREED by and between complainants and William W. Crawford, defendant and cross-complainant, as follows:

I.

That there was evidence offered and received in the District Court sufficient to support the allegations of the bill to the effect that complainants are duly incorporated and qualified by their corporate powers to accept and administer the trusts alleged in the bill.

II.

That upon proceedings proper to be had therefor complainant Union Trust Company has been made a cotrustee with Mississippi Valley Trust Company of the mortgage given by the Oregon-Washington Timber Company and that such proceedings were had prior to the commencement of this suit.

III.

That at the time when this suit was brought the mortgagor corporations were largely in default in the payment of taxes duly and regularly assessed upon their properties in Skamania [216] County, Washington, and also in the payment of their personal property tax. That the default aforesaid covered taxes for the years 1912 and 1913.

IV.

That there was evidence admitted in the District Court to the effect that demands had been made upon the mortgagor corporations in manner and form required by the mortgages and as alleged in the

bill and that in and by the said demands complainants had duly and regularly signified their option to declare the entire debt due and owing from the mortgagor corporations.

HUFFER & HAYDEN,
SNOW & McCAMANT,
Attorneys for Complainants.
KERR & McCORD,
Attorneys for William W. Crawford, Defendant and Cross-complainant.

(Filed Aug. 27, 1915.) **[217]**

[Certificate of Clerk U. S. District Court to Transcript of Record.]

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return that the foregoing pages numbered from 1 to 217 inclusive, constitute a full, true and correct transcript of the record and proceedings in the case of MISSISSIPPI VALLEY TRUST COMPANY etc. et al. vs. WASHINGTON NORTHERN RAILROAD COMPANY, etc. et al. WILLIAM W. CRAWFORD, trustee, cross-complainant, No. 9—Equity, lately pending in this court, as required by the praecipe of counsel filed in said cause, as the originals thereof appear on file in this court, at the city of Tacoma, in the district aforesaid.

I further certify and return that I hereto attach and herewith transmit the original citation, and

original orders extending time to file transcript on appeal, and I also transmit under separate cover and certificate the original exhibits as required by the stipulation of counsel herein filed.

I further certify that the following is a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office, by and on behalf of the appellant herein, for making the record, certificate and return to the United States Court of Appeals for the Ninth Circuit, in the above entitled cause, to wit:

Clerk fees (Sec. 828 R. S. U. S.) for making record, certificate and return, 626 folios @ 15¢ ea	93.90
Certificate of clerk to transcript, 3 fo. @ 15¢.	.45
Certificate as to original exhibits appellant, 2 fo.	.50

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Certificate and seal as to original exhibits of appellees, 2 fo.	.50
Seal to transcript	.20

ATTEST my hand and the seal of the United States District Court, at Tacoma, in the Western District of Washington, Southern Division, this 28th day of December, A. D. 1915.

[Seal] FRANK L. CROSBY,
Clerk.
By E. C. Ellington,
Deputy Clerk. **[219]**

In the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

No. 9–E—IN EQUITY.

MISSISSIPPI VALLEY TRUST COMPANY, a Corporation and UNION TRUST COMPANY, a Corporation,

Complainants.

vs.

WASHINGTON NORTHERN RAILROAD COMPANY, a Corporation; OREGON-WASHINGTON TIMBER COMPANY, a Corporation; BLAZIER TIMBER COMPANY, a Corporation; and WILLIAM W. CRAWFORD, Trustee,

Defendants.

WILLIAM W. CRAWFORD, Trustee,

Cross-complainant,

vs.

WASHINGTON NORTHERN RAILROAD COMPANY, a Corporation; OREGON-WASHINGTON TIMBER COMPANY, a Corporation; BLAZIER TIMBER COMPANY, a Corporation, MISSISSIPPI VALLEY TRUST COMPANY, a Corporation, Trustee; UNION TRUST COMPANY, a Corporation, Trustee; FRANK P. HAYS and WILLIAM C. LITTLE, Copartners Doing Business as LITTLE & HAYS;——HAYS; BRECKENRIDGE JONES; ELI KLOTZ; JAMES GROVER; JAMES E. BROECK; J. E.

BLAZIER; E. J. BLAZIER; and JOHN A. PRESCOTT and D. L. ROBINSON, Copartners Doing Business as JOHN A. PRESCOTT & COMPANY,

Defendants.

Citation on Appeal.

United States of America,—ss.

To Washington Northern Railroad Company, a Corporation; Oregon-Washington Timber Company, a Corporation; Blazier Timber Company, a Corporation; Mississippi Valley Trust Company, a Corporation, Trustee; Union Trust Company, a Corporation, Trustee; [220] Frank P. Hays and William C. Little, Copartners Doing Business as Little & Hays; —— Hays; Breckenridge Jones; Eli Klotz; James Grover; James E. Broeck; J. E. Blazier; E. J Blazier; and John A. Prescott and D. L. Robinson, Copartners Doing Business as John A. Prescott & Company; Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, State of California, thirty days from date hereof, on the 13th day of September, A. D. 1915, pursuant to an order allowing an appeal, filed and entered in the office of the clerk of the District Court of the United States for the Western District of Washington, Southern Division, from a final decree signed, filed and entered on the 4th day of March, A. D. 1915, in that certain suit, being in equity, wherein the Mississippi Valley Trust Com-

pany, a corporation, and Union Trust Company a corporation, trustees, are complainants, and Washington Northern Railroad Company, a corporation, Oregon-Washington Timber Company, a corporation, Blazier Timber Company, a corporation, and William W. Crawford, trustee, are defendants; and wherein William W. Crawford, trustee, is cross-complainant and Washington Northern Railroad Company, a corporation, Oregon-Washington Timber Company, a corporation, Blazier Timber Company, a corporation, Mississippi Valley Trustee Company, a corporation, trustee, Union Trust Company, a corporation, trustee, Frank P. Hays and William C. Little, copartners doing business as Little & Hays, —— Hays, Breckenridge Jones, Eli Klotz, James Grover, James E. Broeck, J. E. Blazier, E. J. Blazier, and John A. Prescott and D. L. Robinson, copartners doing business as John A. Prescott & Company, are defendants, to show cause, if any there be, why the decree rendered against the said William W. Crawford, trustee, as in said order allowing appeal mentioned, should not be corrected, and why **[221]** justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD *C.* CUSHMAN, United States District Judge for the Western District of Washington, this 13th day of August, A. D. 1915.

[Seal] EDWARD E. CUSHMAN,
United States District Judge for the Western District of Washington.

Service accepted Aug. 13, '15.

WALTER McCAMANT,
HUFFER & HAYDEN,
Attys. for Complainant. [222]

[Endorsed]: No. 9–E. In the District Court of the United States for the Western District of Washington, Southern Division. Mississippi Valley Trust Company, a Corporation et al., Complainants, vs. Washington Northern Railroad Company, a Corporation et al., Defendants. William W. Crawford, Trustee, vs. Washington Northern Railroad Company et al, Defendants. Citation on Appeal. Filed in the U. S. District Court Western Dist. of Washington, Southern Division. Aug. 13, 1915. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

In the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

No. 9.

MISSISSIPPI VALLEY TRUST COMPANY, a Corporation, et al., Trustees,
Complainants,

vs.

WASHINGTON NORTHERN RAILROAD COMPANY, a Corporation, et al.,
Defendants,

WILLIAM W. CRAWFORD, Trustee,
Cross-complainant,

vs.

WASHINGTON NORTHERN RAILROAD COMPANY, a Corporation, et al.,
Defendants.

Order Enlarging Time [to October 15, 1915] for Filing Record.

Good cause being shown it is by the undersigned, the Judge who signed the citation on appeal herein to the United States Circuit Court of Appeals for the Ninth Circuit,

ORDERED that the time of the defendant and cross-complainant, William W. Crawford, the appellant in said appeal, for filing the record and docketing the said cause on said appeal to the United States Circuit Court of Appeal for the Ninth Circuit be and the same is hereby extended and enlarged until and including the 15th day of October, A. D. 1915.

Dated at Tacoma, Washington, this 13 day of September, A. D. 1915.

OK.—S. & McC.

JEREMIAH NETERER,

United States District Judge for the Western District of Washington. [223]

[Endorsed]: No. 9. In the District Court of the United States for the Western District of Washington, Southern Division. Mississippi Valley Trust Company et al., Trustees, Complainants, vs. Washington Northern Railroad Company et al., Defendants. William W. Crawford, Trustee, Cross-complainant, vs. Washington Northern Railroad Co. et al., Defendants. Stipulation Enlarging Time for Filing Record. Filed in the United States District Court, Western District of Washington. Sep. 13, 1915. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

In the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

IN EQUITY—No. 9.

MISSISSIPPI VALLEY TRUST COMPANY, a Corporation, et al., Trustees,

Complainants,

vs.

WASHINGTON NORTHERN RAILROAD COMPANY, a Corporation et al.,

Defendants,

WILLIAM W. CRAWFORD, Trustee,

Cross-complainant,

vs.

WASHINGTON NORTHERN RAILROAD COMPANY, a Corporation et al.,

Defendants.

Order Enlarging Time [to November 15, 1915] for Filing Record.

Good cause being shown, it is by the undersigned, the Judge who signed the citation on appeal herein to the United States Circuit Court of Appeals for the Ninth Circuit,

ORDERED: That the time of said cross-complainant, the appellant in said appeal, for filing the record and docketing the cause on said appeal in the United States Circuit Court of Appeals for the Ninth Circuit, be and the same is hereby extended and enlarged until and including the 15th day of November, A. D. 1915.

Dated at Tacoma, Washington, this 2d day of November, 1915.

Nunc Pro Tunc as of Oct. 15, 1915.

EDWARD E. CUSHMAN,
United States District Judge for the Western District of Washington.

It is stipulated the above order shall be entered and signed by Judge E. E. Cushman as of date of Oct. 15, 1915, and shall be entered and recorded on Oct. 15, 1915, [224] and if necessary a *nunc pro tunc* order so entering said order may also be entered.

KERR & McCORD,
Attys. for W. W. Crawford, Trustee.
HUFFER & HAYDEN,
Attorneys for Complainants.

[Endorsed]: No. 9. In the District Court of the United States for the Western District of Washington, Southern Division. Mississippi Valley Trust Company, a Corporation, et al., Complainants, vs. Washington Northern Railroad Company, a Corporation, et al., Defendants. William W. Crawford, Trustee, Cross-complainant, vs. Washington Northern Railroad Company, a Corporation, et al., Defendants. Order Enlarging Time for Filing Record. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Nov. 2, 1915. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

In the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

IN EQUITY—No. 9.

MISSISSIPPI VALLEY TRUST COMPANY, a Corporation, et al., Trustees,

Complainants,

vs.

WASHINGTON NORTHERN RAILROAD COMPANY, a Corporation, et al.,

Defendants.

WILLIAM W. CRAWFORD, Trustee,

Cross-complainant,

vs.

WASHINGTON NORTHERN RAILROAD COMPANY, a Corporation, et al.,

Defendants.

Order Enlarging Time [to February 15, 1916] for Filing Record.

Good cause being shown, it is by the undersigned, the Judge who signed the citation on appeal herein to the United States Circuit Court of Appeals for the Ninth Circuit,

ORDERED, That the time of said cross-complainant, the appellant in said appeal, for filing the record and docketing the cause on said appeal in the United States Circuit Court of Appeals for the Ninth Circuit, be and the same is hereby extended and enlarged until and including the 15th day of Feb., A. D. 1916.

Dated this 13th day of Nov., A. D. 1915.

EDWARD E. CUSHMAN,

United States District Judge for the Western District of Washington. [225]

[Endorsed]: No. 9. In the District Court of the United States for the Western District of Washington, Southern Division. Mississippi Valley Trust Company, a Corporation, et al., Trustees, Complainants, vs. Washington Northern Railroad Company, a Corporation, et al., Defendants. William W. Crawford, Trustee, Cross-complainant, vs. Washington Northern R. R. Co., a Corp., et al., Defendants. Order Enlarging Time for Filing Record. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Nov. 13, 1915. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

In the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

No. 9–E.

MISSISSIPPI VALLEY TRUST COMPANY, a Corporation, et al., Trustees,

Complainants,

vs.

WASHINGTON NORTHERN RAILROAD COMPANY, a Corporation, et al.,

Defendants.

WILLIAM W. CRAWFORD, Trustee,
Cross-complainant,
vs.
WASHINGTON NORTHERN RAILROAD COMPANY, a Corporation, et al.,
Defendants.

Order [Modifying Order of November 13, 1915, Enlarging Time].

The motion of complainants to vacate the order heretofore passed extending the time for filing the record and docketing this cause on appeal coming on for hearing, and it appearing that, on the 13th day of November, 1915, this Court entered an order extending the time for cross-complainant, the appellant on said appeal, for filing the record and docketing this cause on said appeal in the United States Circuit Court of Appeals for the Ninth Circuit until and including the 15th day of February, 1916, and it further appearing that said time should be shortened to the 5th day of January, 1916,

IT IS ORDERED that the said order of November 13, 1915, be, and the same is hereby modified so that the said date of the "15th day of February, 1916," shall read "5th day of January, 1916."

~~AND IT IS FURTHER ORDERED that the Clerk of this court be, and he is hereby ordered and directed to transmit and forward the said record and transcript on appeal to the United States Circuit Court of Appeals not later than December 31st, 1915.~~

Dated this 20th day of December, 1915.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: Original. No. 9–E. In the United States District Court, Western District of Washington, Southern Division. Mississippi Valley Trust Co. et al., Trustees, Complainants, vs. Washington Northern Railroad Co., Defendants, etc. Order. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Dec. 20, 1915. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

[Endorsed]: No. 2723. United States Circuit Court of Appeals for the Ninth Circuit. William W. Crawford, Trustee, Appellant, vs. Washington Northern Railroad Company, a Corporation, Oregon-Washington Timber Company, a Corporation, Blazier Timber Company, a Corporation, Mississippi Valley Trust Company, a Corporation, Trustee, Union Trust Company, a Corporation, Trustee, Frank P. Hays and William C. Little, Copartners Doing Business as Little & Hays, —— Hays, Breckenridge Jones, Eli Klotz, James Grover, James E. Broeck, J. E. Blazier, E. J. Blazier and John A. Prescott and D. L. Robinson, Copartners Doing Business as John A. Prescott & Company, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Southern Division.

Filed December 30, 1915.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

[Certificate of Clerk U. S. District Court to Original Exhibits.]

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the enclosed papers are the original exhibits introduced in the case of Mississippi Valley Trust Company vs. Washington Northern Railroad Company et al., No. 9—Equity, by the complainants, and stipulated by counsel to be forwarded to the United States Circuit Court of Appeals for the Ninth Circuit:

Exhibit 8—Copy of Mortgage, Washington Northern Rd. Co. to Mississippi Valley Trust Co., dated June 4, 1910;

Exhibit 9—Copy of first mortgage, Ore. Wash. Timber Co. to Mississippi Valley Trust Co., dated June 4, 1910;

Exhibit 10—Copy of second mortgage, Oregon-Wash. Timber Co. to Mississippi Valley Trust Co., dated June 4, 1910;

Exhibit 11—Copy of Mortgage, Wash. Northern Rd. Co. Ore. Wash. Timber Co. and Blazier Timber Co. to Wm. W. Crawford, Trustee, dated March 1, 1912;

Exhibit 13—Proposal of Ore.Wash. Timber Co. to Wash. Northern Rd. Co. dated June 4, 1910, on subject of purchase of bonds of Wash. Northern Rd. Co. by Ore. Wash. Timber Co., etc.

Exhibit 15—Statement of payments of principal and interest called for by complainants' mortgages prior to bringing of the suit.

Exhibit 16—Certain accounts shown by books of Wash. Northern Rd. Co. and Ore. Wash. Timber Co.

Exhibit 17—Entry on books of Washington Northern Rd. Co. of credit to first mortgage 6% bond account—$1,000,000 bonds.

Exhibits 18 and 19—Pages of Account-book of Washington Northern Rd. Co.

Exhibit 29—File of Letters from Zane & Busby & Weber to J. E. Blazier.

Exhibit 30—Letter and account.

Exhibit 31—Contract between the Wash. Northern Rd. Co. and Weist. Logg. Co.

Exhibit 32—Statement of payments on Weist Logg. Co. contract.

Exhibit 33—Copy resolution authorizing execution of mortgage of June 4, 1910, by Ore. Wash. Timber Co. to Miss. Valley Tr. Co.

Exhibit 34—Pages 59–60 and 61, Vol. 3 of Ore. Wash. Logg. Co. afterwards Ore. Wash. Timber Co.

Exhibit 36—Certain pages Record-book #4 Ore. Wash. Logg. Co. afterwards Ore. Wash. Timber Co.

Exhibit 37—Extracts from minute-book of Wash. Northern Rd. Co.

Attest my official signature and the seal of this

Court, at Tacoma, this 28th day of December, A. D. 1915.

[Seal] FRANK L. CROSBY,
Clerk.
By E. C. Ellington,
Deputy Clerk.

[Endorsed]: No. 2723. United States Circuit Court of Appeals for the Ninth Circuit. William W. Crawford, Trustee, vs. Washington Northern R. R. Co. et al. Certificate of Clerk U. S. District Court Re Exhibits. Filed Dec. 30, 1915. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals, for the Ninth Circuit.

MISSISSIPPI VALLEY TRUST COMPANY et al.,

Complainants,

vs.

WASHINGTON NORTHERN RAILROAD COMPANY et al.,

Defendants.

Stipulation [That Original Exhibits Need Not be Printed, etc.].

It is stipulated that the original exhibits transmitted with the record in the above case need not be printed; also that both opinions passed by Honorable Edward E. Cushman shall be printed, including the opinion transmitted by solicitors for appellee. It is also stipulated that the cause may be set for

hearing on February 25th, 1916, or February 26th, 1916.

KERR & McCORD,
Solicitors for Appellant, Wm. W. Crawford, Trustee.

SNOW & McCAMANT,
Solicitors for Appellees.

[Endorsed]: Original No. 2723. In the United States Circuit Court of Appeals for the Ninth Circuit. Mississippi Valley Trust Company et al., Complainants, vs. Washington Northern Railroad Company et al., Defendants. Stipulation. Filed Dec. 30, 1915. F. D. Monckton, Clerk.

[Opinion, filed March 27, 1914.]

In the District Court of the United States, Western District of Washington, Southern Division.

No. 9.

MISSISSIPPI VALLEY TRUST COMPANY, a Corporation and UNION TRUST COMPANY, a Corporation, Trustees,
Complainants.

vs.

WAHINGTON NORTHERN RAILROAD COMPANY, a Corporation, OREGON-WASHINGTON TIMBER COMPANY, a Corporation, BLAZIER TIMBER COMPANY, a Corporation, and WILLIAM W. CRAWFORD, Trustee,
Defendants.

Filed March 27, 1914.

[212 Fed. 776.]

SNOW & McCAMANT, for Complainants.

HUFFER & HAYDEN, KERR & McCORD, for Defendant William W. Crawford.

Complainants rely on the following authorities:

Bronson v. LaCrosse R. R. Co., 2 Wall., 283, 310;

Jerome v. McCarter, 94 U. S., 734, 736;

Central Bank v. Hazzard, 30 Fed., 484, 486;

Pratt v. Nixon, 91 Ala., 192; 8 Southern, 751;

Horton v. Davis, 26 N. Y., 495;

Freeman v. Auld, 44 N. Y., 50;

Johnson v. Thompson, 129 Mass., 398, 400; 34 CYC., 758;

Gillespie v. Torrance, 25 N. Y., 306, 311;

Force v. Age-Herald Co., 136 Ala., 271; 33 S., 866, 868;

Allis v. Jones, 45 Fed., 148, 150;

Old Dominion Co. v. Lewisohn, 210 U. S., 206;

Williams Co. v. Kinsey Co., 205 Fed., 375, 376;

34 CYC., 719, 720;

Sec. 3443 Rem. & Bal. Code,

2 Randolph on Commercial Paper, Section 986;

New York Security Co. v. Equitable Co. 77 Fed., 64;

Dooley v. Virginia Co., 7 Fed. Cases, p. 913; Case No. 3999;

In re Burton, 29 Fed., 637, 638, 640;

White v. Fisher, 62 Ill., 258, 259, 261;

Gordon v. Wansey, 21 Cal., 77, 79;

Schinkel v. Hanewinkel, 19 La. Ann., 260;

Thompson's Adm'r v. George, 5 S. W., 760;
Eastman v. Plumer, 32 N. H., 238;
Wallace v. Bank, 1 Ala., 565, 570;
Winans v. Wilkie, 41 Mich., 264; 1 N. W., 1049;
Brosseau v. Lowry, 70 N. E., 901, 904;
Lawson v. McKenzie, 44 Ia., 663;
Swem v. Newell, 19 Colo., 397; 35 Pac., 734, 735;
Kneeland v. Miles, 24 S. W., 1113; 1115 (Tex. App.)
First Nat'l Bank v. Maxfield, 83 Maine, 576; 22 Atl., 479, 480;
First Nat'l Bank v. Harris, 7 Wash., 139; 142 to 144, 34 Pac., 466;
4 Am. & Eng. Enc. of Law, 2d Ed., p. 310;
2 Randolph on Commercial Paper, Sec. 289;
Storey on Promissory Notes, Sec. 120;
Muller v. Pondier, 53 N. Y., 325;
O. Mulcahy v. Holley, 28 Minn., 31;
Central Trust Co. v. First Nat'l Bank, 25 Law Ed., U. S., 876–8;
Thompson-Houston Elec. Co. v. Capitol Electric Co., 56 Fed., 849;
Spinning vs. Sullivan, 11 N. W., 758;
Galusha v. Sherman, 47 L, R. A., 417;
Osgood's Adms. v. Artt., 17 Fed., 575.

The defendant Crawford relies upon the following authorities:

Sec. 848 Vol. 3 Cook on Corporations, Drury vs. Cross, 7 Wall., 299;

CUSHMAN, District Judge.

Complainants interpose a motion to strike out certain paragraphs of the amended answer of the de-

fendant, William W. Crawford. For a proper understanding of the matter, a brief outline of the complaint and answer is necessary.

Complainants ask the foreclosure of two mortgages, executed January 4, 1910—one upon the property of the Washington Northern Railroad Company, hereinafter referred to as the "railroad company," and the other upon the property of the Oregon-Washington Timber Company—both given to the Mississippi Valley Trust Company, the first of which is now held by it and the second by it and its cotrustee, Union Trust Company, one of the plaintiffs herein.

The railroad company's mortgage was given to secure bonds to the amount of $1,000,000.00, all of which have been issued. The Oregon-Washington Timber Company's mortgage was given to secure $600,000, in bonds. All of the railroad company's bonds were purchased by the Oregon-Washington Timber Company, and $600,000 worth of these bonds were surrendered to the Mississippi Valley Trust Company, as part of the security for the payment of the $600,000 of the Oregon-Washington Timber Company's bonds.

The Oregon-Washington Timber Company's mortgage provides that, upon the payment of any of its bonds, a like amount, par value, of the railroad company's bonds, so conveyed to the trust company, should be also cancelled and returned to the railroad company, or delivered to it uncancelled, at the option of the railroad company. The $600,000, of the Oregon-Washington Timber Company's bonds were sold.

On the same date (June 4, 1910), the Oregon-Washington Timber Company executed a second mortgage to the same trustee to secure a bond issue of $400,000, sold by it to the railroad company, and also transferred to the railroad company, to secure the payment of the $400,000, a like amount of the railroad company's bonds, which latter bonds are held by the trustee. The second mortgage, in like manner, provides for the surrender of the railroad company's bonds, upon payment of those of the Oregon-Washington Timber Company.

The railroad company and the two defendant timber companies, on March 1, 1912, gave a further mortgage to the defendant Crawford, as trustee, by which the railroad company assigned to him the said $400,000 second mortgage bonds of the Oregon-Washington Timber Company and the $1,000,000 of the railroad company's bonds—the latter to be delivered upon their release under the prior mortgages.

By an agreement between the railroad company and the Oregon-Washington Timber Company, the proceeds of the second mortgage bonds of the Oregon-Washington Timber Company, secured by the $400,000 of the railroad company's bonds, were to be used in building additional railroad lines, but were pledged to the trustee, Crawford, who, it is charged, had notice of the terms of this agreement. Thirty thousand dollars, only, of the Oregon-Washington Timber Company's bonds have been paid. Upon which, $30,000 of the railroad company's bonds were released and delivered to the mortgagee, Crawford, uncancelled.

The complainants ask, upon the decree, a determination whether the $430,000 railroad company's bonds claimed by Crawford are equal in dignity, or postponed to the $570,000 held as security by complainants.

The defendant, Crawford, trustee, answers that a proposition made June 4, 1910, by the Oregon-Washington Timber Company, was accepted by the railroad company, the material parts of which proposition were:

> "We understand that you are proposing to make certain extensions to your railroad (formerly owned by the Cape Horn Railroad Company), the result of which will be to increase our facilities for marketing the timber from our lands in Skamania County, Washington, and that you have authorized an issue of One Million Dollars ($1,000,000.) par value first mortgage six per cent gold bonds, dated the 4th day of June, 1910, due on the first day of May, 1928, and secured by a first mortgage on your railroad property.
>
> "We propose to buy from you the entire issue of One Million Dollars ($1,000,000) par value of said bonds and pay you therefor Four Hundred Thousand Dollars ($400,000.) par value of our bonds as hereinafter described, and the sum of Five Hundred and Forty Thousand Dollars in money, said money to be used for the following purposes:
>
> * * * * * * * * *
>
> "$125,000 to be used for the payment of the

present floating indebtedness of the Cape Horn Railroad Company.

"$215,000 to be used for extensions, betterments and equipment to your railroad property."

* * * * * * * * *

As a further consideration for the sale to us of said One Million Dollars ($1,000,000) of your bonds, and without any new or further consideration, we agree to sell and deliver to you Four Hundred Thousand Dollars ($400,000) par value six per cent gold bonds issued by us, dated the 4th day of June, 1910, due serially $30,000 par value every six months, beginning May 1st, 1922, the last $40,000 thereof maturing May 1st, 1928, and secured by second mortgage on our lands and timber in Skamania County, Washington, and secured also by $400,000 par value of the $1,000,000. par value of bonds now proposed to be purchased by us from you; said $400,000 par value of our bonds so sold to you, however, or the proceeds of the sale thereof, to be used by you only for future extensions, betterments or equipment to your railroad, after the expenditure of the said sum of $540,000 above mentioned.

"The $1,000,000 par value of your bonds hereby proposed to be purchased by us are all to be executed and delivered by you to the trustee in the mortgage securing the same, and to be by said trustee duly authenticated, and $600,000 par value thereof to be deposited with the Mississippi Valley Trust Company of St. Louis, Missouri, to be by it held in trust as security un-

der the terms of a certain first mortgage dated June 4, 1910, executed by us to said Mississippi Valley Trust Company to secure an issue of $600,000 par value of 6% gold bonds issued by us, and the remaining $400,000 par value of your bonds hereby proposed to be purchased are to be deposited with the said Mississippi Valley Trust Company to be by it held in trust as security under the terms of a certain second mortgage dated June 4th, 1910, executed by us to said Trust Company to secure an issue of Four Hundred Thousand Dollars ($400,000) par value second mortgage 6% gold bonds issued by us, which latter $400,000 par value second mortgage bonds are the bonds hereinabove agreed to be sold and delivered to you.

"The said sum of $540,000 to be deposited as needed for the purposes mentioned above to your credit at said Mississippi Valley Trust Company and to be paid out in checks signed by you and countersigned by said Trust Company for said purposes."

It is averred that the $600,000 timber company bonds mentioned were sold to a syndicate, together with $999,300 par value of the corporate stock of the railroad company for $540,000; that the members of the syndicate and trust company knew, at the time of the purchase, of the purposes to which—by the agreement—the money raised was to be applied; that a large portion of these bonds are still held by the members of this syndicate; that, instead of the money being expended as agreed, the proceeds of the

sale of the bonds were spent, in part as follows:

"$175,000 for the payment of timber lands acquired by the Oregon-Washington Timber Company from the Whitney Estate.

"An amount in excess of $100,000, as this defendant believes and charges to be the fact, in building camps and in buying additional logging equipment for the Oregon-Washington Timber Company."

That the railroad company was without power to issue bonds for such purpose; but this was done by the trust company at the direction of the present holders of the $570,000 bonds upon which suit is brought, $300,000 of which bonds are still held by the members of the syndicate; that complainants are estopped from sharing in the proceeds of the sale of the railroad company's property, to the extent of such unauthorized expenditure.

This defendant further avers that, in February, 1911, the Blazier Timber Company was incorporated; that, subsequently, the two timber companies and the railroad company authorized the execution, by the three companies, of two series of notes:

Series "A" to consist of $100,000 joint collateral trust notes,

Series "B," of $150,000, joint collateral notes.

These notes were secured by an indenture of the three companies to the Mississippi Valley Trust Company conveying all of the property of the Blazier Timber Company and the railroad company assigned to the trustee the $400,000 second mortgage bonds of the Oregon-Washington Timber Company

and $400,000 of its own bonds, deposited as collateral security for those of the timber company.

The proceeds of the Series "A" notes were used as authorized; but it is alleged that the Series "B" notes were delivered to the syndicate for the purchase of the railroad company's stock, sold to the syndicate with the first mortgage bonds of the Oregon-Washington Timber Company; that the stock was not sold to either of the three companiese, but to J. E. Blazier, individually; that the amount of these notes has been paid to the members of such syndicate by the railroad company and the Blazier Timber Company, for which purpose the funds of such companies have been unlawfully diverted. These transactions are alleged as an offset herein. To have an accounting of such funds, defendant asks that the members of the syndicate be brought into the suit, or, if beyond the jurisdiction, that they be denied the right to participate in the proceeds of the sale upon foreclosure herein.

The motion to strike is directed to the foregoing allegations of the answer.

The mortgage to the defendant, Crawford, expressly recognizes the priority of the mortgages being foreclosed herein and the $600,000 of bonds issued thereunder. As a subsequent mortgagee, the defendant, Crawford, is estopped to deny such priority.

> "At the time this third mortgage was executed, and thus made subject to the second mortgage bonds, all these bonds had been negotiated

by the company, and were in circulation, in the business community. They were all negotiated in the months of September, October, November and December, 1857. This, the company, of course, well knew at the time of the execution of the third mortgage, and knew, also, of the circumstances attending the negotiation of them. They had received and were in the enjoyment of the avails of them, and with this knowledge, and under these circumstances, the third mortgage, and the bonds issued under it, were made in express terms subject to the payment and satisfaction of the bonds issued under the second. All persons, therefore, taking these third mortgage bonds, or coming in under the mortgage, took them and came in with a full knowledge that the mortgagor had made the security subject to the prior lien and indebtedness. Even if there had been any valid objection to these bonds under the second mortgage, it was competent for the obligor to waive them, and no better proof could be furnished of the waiver, than the acknowledgment of the full indebtedness, by making the subsequent security subject to it. This was a question that belonged to the obligor to determine for himself when giving the third mortgage; but, besides this, what right have those coming in under it to complain? They come in with full notice of the acknowledgement of the indebtedness and previous lien; and, especially, what right have the Milwaukee and Minnesota Company to com-

plain, who purchased the equity of redemption through Barnes, their agent, subject to the previous incumbrances of $1,000,000. They have the benefit of that incumbrance by an abatement of that amount in the price of the purchase." Bronson v. La Crosse Railroad Co., 2 Wall., 283, at 311.

Jerome vs. McCarter, 94 U. S., 734.

Clearly the matters set up do not amount to payment of the bonds. To constitute payment something of agreement, or consent, actual or constructive, as to the application of credits, either on behalf of the trust company, or the bond holders, or the mortgagor would be necessary. Consent of the mortgagor might take the form of asking the application of payment of the funds theretofore wrongfully diverted or misappropriated, but where one claims through the debtor, such consent in some form is essential.

The diversion of the funds from their authorized purpose is not a failure of consideration. The $540,000 agreed to be paid for the bonds, was the consideration therefor. It was paid and received by the mortgagor and, if the agreement collateral to the mortgage between the railroad company and the Oregon-Washington Timber Company, as to its expenditure, was violated and more money expended for the benefit of the timber company than agreed, it cannot be said to be a failure of consideration for the bonds or mortgage securing them. When the money was paid for the bonds, the bond holders were not, thereafter, concerned or responsible for its dis-

position. If they were subsequently guilty of misconduct—having acquired the bonds in good faith—and not acting in a fiduciary relation thereto, it would not avoid the bonds, but be the subject matter of an independent cause of action.

Considering the matters set up in the answer as in the nature of a set off or counter claim, and putting to one side the question whether they are of such a nature as to warrant their pleading by the proper party, under Equity Rule 30, yet it is clear that they are causes of complaint which concern the railroad company in the one instance, and the railroad company and the Blazier Timber Company in the second instance, and that Crawford, as a subsequent mortgagee, does not control them—that they are not asserted by the holder of the right of action thereunder, if any.

> "Mutual cross-demands do not as a general rule extinguish each other by the mere operation of the law regulating setoffs, without the acts of the parties, and a defendant holding a claim against plaintiff is not compelled to avail himself of it but has the option of pleading the same by way of setoff in an action against him, or of making it the ground of an independent action, and the rule is the same in regard to recoupment, and counterclaim; and plaintiff has no option or power to require him to do so, or to apply the subject of the setoff as a payment on his demand, in the absence of any agreement authorizing such application;" 34 Cyc., 758.

The allegations that the debtor companies are in-

solvent are not sufficient to warrant the court in giving to a particular creditor—where *they* may be many interests affected—the right to speak and make election for the alleged insolvents.

The defendant urges that his defense is not controlled by the foregoing reasons, because of the fact that, while his mortgage, executed by the three defendant companies, expressly recognized the priority of the mortgages herein sought to be foreclosed and the bond issues thereunder, yet, as part of his security, there were assigned to him the railroad company bonds held by complainants, to be delivered to him as they were, from time to time, surrendered, under the terms of the first mortgage; that, therefore, defendant, as a holder of bonds secured by the first mortgage of the railroad company, is not estopped to question the amounts due other bond holders of the same issue.

This position is untenable. Defendant cannot now be considered as the innocent holder of negotiable paper before maturity, for he did not come into possession of the bonds at the time he parted with his money. He has not possession now of the bonds. They are in the possession of complainants to secure another's claim. But $30,000 of them have been released. Defendant can have no right to them until they are released.

2 American & English Encyc. of Law, Sec. Ed., 310;

7 Cyc., 926;

Muller v. Pondier, 55 N. Y., 325, 335; 14 Am. Rep., 259;

To accomplish their surrender may take the entire property securing them, and, so far as the first bond issue is concerned, he gets them, if at all, after they have matured and, in effect, been paid.

It is not necessary to consider whether, under the circumstances of this case, the railroad company's bonds are held as collateral security, or otherwise. The effect upon this defense is the same. The recognition by an unsecured creditor of the right of the debtor, upon payment, to obtain, uncancelled, the written evidence of the debt, would justify the conclusion that such unsecured creditor contemplated the effective reissue of such obligation. But that is not this case.

The railroad company was interested in having its bonds surrendered to it, and not surrendered to the timber company—the party pledging the railroad company's bonds and, ordinarily, entitled, upon the payment of its debt, to a surrender of the collateral securing it. By the surrender of its bonds to the railroad company, the size of its debt was lessened. To say it might, at its option, receive these bonds, uncancelled, would get around—so far as the parties to the agreement are concerned—the reasoning embodied in that line of decisions holding that their surrender would, absolutely, extinguish them for all purposes, as evidences of existing obligations.

In re Burton, 29 Fed., 637.

But, in the absence of a more clearly expressed intention than appears in the first mortgages, it could not fairly be assumed that it was intended that the surrender bonds, if reissued, should assume even

rank with those not surrendered. The prior creditor is entitled to its security to the full from both mortgagors, and this right is undiminished until its debt is fully paid.

N. Y. Security & T. Co. v. Equitable Mortgage Co., 77 Fed., 64.

If the money paying the timber company's bonds was realized from the property of the railroad company, and a railroad company bond was surrendered and reissued, of equal rank with those unsurrendered, the security for the remaining bonds would be lessened and diluted. Such a proceeding would effect a partial release of the mortgage.

By surrendering, or agreeing to surrender to the obligor uncancelled bonds discharged from the mortgage securing them, no right, under the mortgage is assigned or given. By that transaction, they are severed and separated from the mortage, originally securing them, and, unless some innocent purchaser —ignorant of their reissue, held them for value, they could not again be held to share under the lien of the mortgage.

Whether such circumstances would affect such reinstatement of such bonds under the mortgage, it is not now necessary to determine; but, if such was the result, it would, primarily, depend upon equitable principles not here present. Under the circumstances of this case, to warrant such an effect, the language should be clear and positive.

Whatever the effect of the reissue of these bonds to Crawford, on debts contracted subsequent to the first mortgage and prior to their delivery, may be,

every reason is against their being held of equal rank with unpaid and unsurrendered bonds of the same issue.

All of the matters moved against will be stricken.

[Endorsed]: No. 2723. United States Circuit Court of Appeals, for the Ninth Circuit. Filed Dec. 30, 1915. F. D. Monckton, Clerk.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

WILLIAM W. CRAWFORD,
Appellant,

vs.

WASHINGTON NORTHERN RAILROAD COMPANY, a corporation, OREGON-WASHINGTON TIMBER COMPANY, a corporation; BLAZIER TIMBER COMPANY, a corporation; MISSISSIPPI VALLEY TRUST COMPANY, a corporation, Trustee; UNION Trustee; FRANK P. HAYS and WILLIAM C. LITTLE, co-partners doing business as LITTLE & HAYS; —— HAYS; BRECKENRIDGE JONES, ELI KLOTZ, JAMES GROVER, JAMES E. BROECK, J. E. BLAZIER, E. J. BLAZIER; and JOHN A. PRESCOTT and D. L. ROBINSON, co-partners doing business as JOHN A. PRESCOTT & COMPANY,
Appellees.

No. 2723.

BRIEF OF APPELLANT

Upon Appeal from the United States District Court for the Western District of Washington, Southern Division

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STATEMENT.

This action was instituted by the Mississippi Valley Trust Company and the Union Trust Com-

pany to foreclose two mortgages executed on June 4th, 1910, upon real and personal property situated in the State of Washington.

One of said mortgages was executed in June, 1910, by the Washington Northern Railroad Company to the Mississippi Valley Trust Company to secure an issue of bonds in the aggregate amount of $1,000,000. The other mortgage was executed to the Mississippi Valley Trust Company and the Union Trust Company by the Oregon-Washington Timber Company to secure an issue of bonds in the aggregate amount of $600,000. (Complainants' Exhibits 8 and 9, Tr. p. 246).

On the 10th of June, 1910, the Oregon-Washington Timber Company executed to the Mississippi Valley Trust Company a second mortgage to secure an issue of bonds in the sum of $400,000. (Complainants' Exhibit 10, Tr. p. 247).

On the same date the Oregon-Washington Timber Company made a written proposition to the Washington Northern Railroad Company to purchase its $1,000,000 of first mortgage bonds and pay for the same by the transfer and delivery to the railroad company of $400,000 of the second mortgage bonds of the Oregon-Washington Timber Company, secured by $400,000 of the first mortgage bonds of the railroad company, and by the further

payment of the sum of $540,000 in cash, to be used for certain specific purposes. (Complaints' Exhibit 13, Tr. 76, 247, 309).

The $600,000 of the first mortgage bonds of the railroad company were delivered to the Mississippi Valley Trust Company in trust as security for the $600,000 of the first mortgage bonds of the Oregon-Washington Timber Company and the remaining $400,000 first mortgage bonds of the railroad company were deposited with Mississippi Valley Trust Company as security for the $400,000 of second mortgage bonds issued by the Oregon-Washington Timber Company. (Tr. p. 79). The first mortgage bonds of the railroad company were numbered from 1 to 1000 inclusive, and each bond was for the amount of $1000. The first mortgage bonds of the Oregon-Washington Timber Company were numbered from 1 to 600 inclusive and were for $1000 each, and the second mortgage bonds of the timber company were numbered from 1 to 400 inclusive, each for the amount of $1000.

The foreclosure of the first mortgage of the Washington Northern Railroad Company, securing bonds in the sum of $1,000,000 and the foreclosure of the first mortgage of the Oregon-Washington Timber Company securing $600,000 of bonds were attempted in a single amended bill of complaint. (Tr. pp. 3-38).

On April 1st, 1912, the Washington Northern Railroad Company, the Oregon-Washington Timber Company, and the Blazier Timber Company executed to William W. Crawford, trustee, a certain mortgage upon real and personal property in the State of Washington, to secure bonds in the aggregate sum of $425,000. (Complainants' Exhibit 11, Tr. p. 247).

William W. Crawford, trustee, answered the amended bill of complaint, making admissions and denials and interposed two affirmative defenses in his answer (Tr. pp. 64-91). To the affirmative defenses the complainants Mississippi Valley Trust Company and Union Trust Company interposed a motion to strike certain paragraphs therefrom. (Tr. pp. 163-166).

This motion was sustained by the Court (Tr. p. 167). Thereafter the appellant, William W. Crawford, filed his cross-complaint to foreclose his said mortgage of April 1st, 1912. The opinion of the Court sustaining the motion was in writing (Tr. pp. 305-320). To the cross-complaint the complainants answered (Tr. pp. 146-159). The appellant Crawford also moved to dismiss the bill of complaint (Tr. p. 159) and the same was denied by the Court (Tr. p. 162).

Upon the issues made up by the pleadings the

case proceeded to trial and on the 4th of March, 1915, the final decree was entered, foreclosing the first mortgage executed by the Washington Northern Railroad Company to the Mississippi Valley Trust Company and the first mortgage executed by the Oregon-Washington Timber Company to the Missippi Valley Trust Company and the Union Trust Company; also the mortgage executed by the Washington Northern Railroad Company, the Oregon-Washington Timber Company and the Blazier Timber Company to William W. Crawford, trustee (Tr. pp. 178-227). From this decree William W. Crawford has prosecuted this appeal.

The specifications of the errors of the Court in the trial of said cause and in the entering of the decree are embraced in the assignments of error (Tr. pp. 231-246) and are as follows:

I.

That the United States District Court for the Western District of Washington, Southern Division, erred in denying the motion interposed by the defendant and appellant, William W. Crawford, trustee, to strike certain paragraphs and allegations contained in the original complaint filed in the case.

II.

That the said Court erred in denying the motion interposed by the defendant and appellant, William

W. Crawford, trustee, to strike certain paragraphs and allegations contained in the amended complaint filed in said case.

III.

That said Court erred in granting the motion of the complainants to strike certain paragraphs and allegations from the answer of the defendant, William W. Crawford, trustee, and to strike certain paragraphs and allegations from the cross-complaint of the cross-complainant, William W. Crawford, trustee.

IV.

That said Court erred in making and entering the following finding and holding contained in the decree:

"Heretofore, and on June 4th, 1910, the defendant railroad company executed and delivered to camplainant Mississippi Valley Trust Company, as trustee, its certain deed of mortgage conveying and transferring to the trustee thereunder certain properties hereinafter described, and the same having been so executed as to entitled it to record the same was on June 10, 1910, duly recorded in the office of the Auditor of Skamania County, Washington, wherein the properties therein described were situated, in Book 'I' of Mortgages, pages 339 to 356, both inclusive; said mortgage was executed to secure 1000 bonds, numbered from 1 to 1000, both inclusive and of the denomination of $1000 each, dated as of June 4th, 1910, and maturing on May 1st, 1928, 600 of the bonds, numbered from 1 to 600, both inclusive, being by the railroad company duly negotiat-

ed and deposited with the Mississippi Valley Trust Company, as trustee, by way of collateral to a mortgage bond issue of the Oregon-Washington Timber Company of June 4th, 1910, hereinafter found and determined, and 400 of the said bonds, numbered 601 to 1000 inclusive were duly negotiated to the Oregon-Washington Timber Company and by it duly assigned to the railroad company as collateral under a second mortgage bond issued by the timber company as hereinafter found and determined. That the debt evidenced by the second mortgage bonds of the timber company has not been paid. That the interest of the railroad company in the said 400 railroad bonds immediately on its acquiring of the same because subject to the lien of the 600 railroad bonds then outstanding, and the said 400 railroad bonds could be, and were in fact, reissued by the railroad company only as inferior in dignity and subsequent in time of payment to the 600 bonds first negotiated and then outstanding."

V.

The said Court erred in making and entering the following finding and holding contained in said decree:

"Thereafter and on June 4th, 1910, likewise said the Oregon-Washington Timber Company executed a second mortgage to the Mississippi Valley Trust Company, as trustee, of all and singular the property described in its first mortgage of June 4th, 1910, and of all and singular its ownership, right and title to $400,000 par value of the 6% first mortgage gold bonds of the Washington Northern Railroad Company, dated June 4th, 1910, and which by the terms of said mortgage matured May 1st, 1928. Said second mortgage likewise provided, and the second mortgage bonds issued thereunder so provided, that the mortgage debt should draw interest at

6% per annum, payable semi-annually, and by the terms of the mortgage security and of the bonds issued thereunder the bonds so issued were numbered from 1 to 400, both inclusive and matured serially, first maturity thereof beginning on May 1st, 1922, and terminating May 1st, 1928, and second mortgage bonds secured by said mortgage were negotiated by the timber company and delivered to the Washington Northern Railroad Company, and for the said second mortgage bonds of the timber company, aggregating $400,000 and for considerations running from the said timber company to the railroad company said first mortgage bonds of the railroad company of June 4th, 1910, were issued, negotiated and delivered to the said timber company."

VI.

The said Court erred in making and entering the following finding and holding contained in the decree:

"In the contract for the purchase and sale of said second mortgage bonds it was provided:

"As a further consideration for the sale to us of said $1,000,000 par value of your bonds and without any new or further consideration, we agree to sell and deliver to you $400,000 per value 6% gold bonds issued by us, dated the 1st day of May, 1910, due serially $30,000 par value every six months, beginning May 1st, 1922, and ending May 1st, 1928, secured by a second mortgage on our lands and timber in Skamania County, Washington, and secured also by $400,000 par value of the $1,000,000 par value of bonds now proposed to be purchased by us from you; said $400,000 par value of our bonds so sold to you, however, or the proceeds of the sale thereof, to be used by you only for future extensions, betterments or equipment to your railroad after the expenditure of the said sum of $450,000 above mentioned."

VII.

The said Court erred in making and entering the following finding and holding contained in the decree:

"That the second mortgage bonds of the Oregon-Washington Timber Company and the 400 railroad bonds collateral thereto were not used for future extensions, betterments or equipment for the railroad, but the interests of the Washington Northern Railroad Company therein was assigned and transferred, as hereinafter set forth, to the defendant William W. Crawford, trustee, subject, however, to the paramount lien and interest of the holders of the 600 railroad bonds aforesaid."

VIII.

The said Court erred in finding and decreeing that the true intent and agreement between the complainants and the mortgagors in the mortgages executed severally by the Washington Northern Railroad Company to the Mississippi Valley Trust Company and by the Oregon-Washington Timber Company to the Mississippi Valley Trust Company "was to and did convey all of the property, real, personal and mixed, of every kind and wheresoever situate, and all appendages and appurtenances thereto, and all of the equities of redemption, reversions, interests, liens, franchises, rights, privileges, immunities, claims and demands, as well in equity as in law, then owned, possessed or enjoyed, and which might hereafter be in any wise acquired, owned, possessed or

enjoyed by the Washington Northern Railroad Company or the Oregon-Washington Timber Company, notwithstanding that the same was not particularly set forth in said indentures and not particularly described therein."

IX.

The said Court erred in finding and decreeing that the so-called "after acquired property clause" contained in the mortgage executed by the Washington Northern Railroad Company to the Mississippi Valley Trust Company covered and included the 400 railroad bonds numbered from 601 to 1000 inclusive issued by the Washington Northern Railroad Company.

X.

The said Court erred in making and entering the following finding and holding contained in the decree:

"On March 1, 1912, the Washington Northern Railroad Company, the Oregon-Washington Timber Company, and the Blazier Timber Company, all of which said companies being then owned, dominated and controlled by the same set of people, and practically and in effect one company, pursuant to the unanimous resolution of the stockholders and Board of Directors of the said companies, executed and delivered to the defendant William W. Crawford, trustee, their mortgage deed of trust, whereby they transferred and conveyed to the said trustee the property of the railroad hereinbefore described and which prior thereto had been mortgaged to the Mis-

sissippi Valley Trust Company as trustee, as hereinbefore found, under the mortgage of date June 4th, 1910, and the property of the timber company which had theretofore been mortgaged under its first mortgage of June 4, 1910, to the Mississippi Valley Trust Company as trustee, and which is hereinbefore described and which has been mortgaged likewise by said timber company by its second mortgage of June 4, 1910, hereinbefore found, and the said railroad company, one of the mortgagors to said mortgage, undertook to and did assign to said Crawford, trustee, as part security under said mortgage, $400,000 of the second mortgage bonds of the timber company, issued under its said second mortgage, and $1,000,000 first mortgage bonds of the railroad company *as they should thereafter from time to time be released and delivered, or releasable and deliverable, by the Mississippi Valley Trust Company under the terms and provisions of the first and second mortgage deeds of trust, respectively, of the timber company to said Mississippi Valley Trust Company.*"

XI.

The said Court erred in making and entering the following finding and holding contained in the decree:

"That the effect of the assignment of the railroad bonds so made" (to William W. Crawford) "was to assign the same subject to the prior lien and claim of the holders of the 600 railroad bonds first issued, and to postpone the rights of William W. Crawford, trustee, in the railroad security until after the said 600 railroad bonds had been fully paid and discharged."

XII.

The said Court erred in finding and decreeing

that the mortgage executed by the Oregon-Washington Timber Company, the Washington Northern Railroad Company and the Blazier Timber Company to William W. Crawford, trustee, was subordinate and inferior to the mortgages of June 4th, 1910, executed by the Washington Northern Railroad Company and by the Oregon-Washington Timber Company.

XIII.

The said Court erred in finding and decreeing that the assignment by the Washington Northern Railroad Company to William W. Crawford, trustee, of the $400,000 of first mortgage bonds of the Washington Northern Railroad Company, numbered from 601 to 1000 inclusive, was received and accepted by the said William W. Crawford, trustee, subject and inferior to the lien of the $600,000 of first mortgage bonds of the Washington Northern Railroad Company numbered from 1 to 600, both inclusive.

XIV.

The said Court erred in refusing to hold that the $400,000 of first mortgage bonds of the railroad company so assigned to the said William W. Crawford, trustee, under his mortgage of March 1st, 1912, were of equal standing and rank with the $600,000 of first mortgage bonds of said railroad company numbered from 1 to 600, both inclusive.

XV.

The said Court erred in finding and decreeing that the first mortgage executed by the Washington Northern Railroad Company to the Mississippi Valley Trust Company of June 4th, 1910, and the first mortgage of the Oregon-Washington Timber Company to the Mississippi Valley Trust Company of June 4th, 1910, were all executed and designed as security for one debt, to-wit, the indebtedness of the Oregon-Washington Timber Company under its first mortgage of June 4th, 1910, in the sum of $600,000 represented by the 600 first mortgage bonds of the Oregon-Washington Timber Company and in holding that the bonds secured by the mortgage of March 1st, 1912, executed to William W. Crawford, trustee, by the Washington Northern Railroad Company, the Oregon-Washington Timber Company and the Blazier Timber Company, were and are junior and inferior to the $600,000 of first mortgage bonds of the Oregon-Washington Timber Company and the $600,000 first mortgage bonds of the Washington Northern Railroad Company numbered from 1 to 600, both inclusive.

XVI.

The said Court erred in decreeing that the sum of $33,250 was a reasonable sum to be allowed complainants for the services of their attorneys in this action.

XVII.

The said Court erred in decreeing that $1500 was a reasonable sum to be allowed to the complainants for their services as trustees.

XVIII.

The said Court erred in holding and decreeing that the mortgage of June 4, 1910, executed to the Mississippi Valley Trust Company by the Washington Northern Railroad Company and the mortgage executed by the Oregon-Washington Timber Company to the Mississippi Valley Trust Company of June 4, 1910, should be foreclosed in the same action and cause.

XIX.

The Court erred in adjudging and decreeing that the proceeds of the sale of the property of the Oregon-Washington Timber Company should be applied to the following order:

1. To the payment of the costs of the said sale.
2. To the payment of the certificates of the Receiver of the Oregon-Washington Timber Company.
3. To the payment to Wallace McCamant, solicitor for complainants of the sum of $33,250, the attorney's fee adjudged to be due him for services rendered by him in this cause.
4. To the payment of the interest coupons maturing November 1, 1912, on the bonds of the Oregon-Washington Timber Company, of date June 4, 1910.
5. To the payment of the mortgage debt afore-

said, to-wit, the sum of $570,000 with interest thereon at the rate of 6% per annum from May 1, 1912, less the face of the coupons maturing November 1, 1912.

6. To the payment to E. S. McCord, solicitor for the defendant, William W. Crawford, trustee, of the sum of $2500, the attorney's fee allowed him for the foreclosure of the Crawford mortgage.

7. To the payment to William W. Crawford, trustee, of the sum of $453,591.67, with interest from the 20th day of February, 1915.

8. The overplus, if any, to be paid into Court to be distributed in such manner as the Court may direct.

XX.

The Court erred in adjudging and decreeing that the proceeds of the sale of the properties of the Washington Northern Railroad Company should be applied as follows:

1. To the payment of the costs of said sale.

2. To the payment of the certificates of the Receiver of the Washington Northern Railroad Company.

3. To the payment to Wallace McCamant, solicitor for complainants, of the sum of $33,250, the attorney's fee adjudged to be due him for services rendered by him in this cause.

4. To the payment of the coupons maturing November 1, 1912, on the bonds of the Washington Northern Railroad Company, of date June 4, 1910, numbered 1 to 600, less the 30 bonds which have been paid up and surrendered to said railroad company.

5. To the payment of the mortgage debt aforesaid, to-wit, the sum of $570,000 with interest thereon at the rate of 6% per annum from May 1, 1912, less the face of the coupons maturing November 1,

1912, on bonds 1 to 600, less the 30 bonds which have been paid and retired.

6. To the payment to E. S. McCord, solicitor for the defendant, William W. Crawford, trustee, of the sum of $2500, the attorney's fee allowed him for the foreclosure of the Crawford mortgage.

7. To the payment to William W. Crawford, trustee, of the sum of $453,591.67, with interest from the 20th day of February, 1915.

8. The overplus, if any, to be paid into Court, to be distributed in such manner as the Court may direct.

XXI.

The Court erred in refusing to hold that the proceeds of the sale of the properties of the Oregon-Washington Timber Company should be applied pro rata to the payment of the first mortgage bonds of the Oregon-Washington Timber Company numbered from 1 to 570, both inclusive, and that the equivalent of said sum be applied pro rata to the payment of the first mortgage bonds of the Washington Northern Railroad Company, numbered from 1 to 570, both inclusive, and in refusing to hold that the proceeds of the sale of the properties of the Washington Northern Railroad Company, after the payment of the costs and Receiver's expenses, should be applied upon the $400,000 of first mortgage bonds of the Washington Northern Railroad Company, represented by the said William W. Crawford, trustee, to the extent and in an amount so that each of the bonds numbered from 601 to 1000, both inclu-

sive, should receive a payment thereon equal to the payment on each of the bonds numbered from 1 to 570, both inclusive, and in refusing to hold that the first mortgage bonds of the Washington Northern Railroad Company, numbered from 601 to 1000, both inclusive, are of equal rank with the bonds numbered from 1 to 570, both inclusive of said Washington Northern Railroad Company; and in refusing to direct the application of the remaining proceeds of the sale of the properties of the Washington Northern Railroad Company pro rata upon all of the outstanding first mortgage bonds of the Washington Northern Railroad Company, numbered from 1 to 570, both inclusive and from 601 to 1000, both inclusive; and in holding that the attorney's fee of $33,250 should be paid from the proceeds of the sale of the properties of the Washington Northern Railroad Company prior to the application of the proceeds of the sale of the properties of the Washington Northern Railroad Company upon the indebtedness, principal and interest, represented by said first mortgage bonds of the railroad company.

XXII.

The said Court erred in holding and decreeing that the complainants were entitled to an attorney's fee of $33,250 payable twice, once out of the proceeds of the sale of the properties of the Oregon-

Washington Timber Company and second payable out of the proceeds of the sale of the Washington Northern Railroad Company.

XXIII.

The Court erred in holding and decreeing that $33,250 was a reasonable attorney's fee to be allowed to the complainants for the foreclosure of the mortgage of the Oregon-Washington Timber Company, and in holding that the same sum was a reasonable sum for the foreclosure of the mortgage of the Washington Northern Railroad Company.

XXIV.

The Court erred in refusing to hold and decree that William W. Crawford, trustee, held a first and paramount lien upon the $400,000 of first mortgage bonds of the railroad company numbered from 601 to 1000, both inclusive, and in refusing to hold and decree that the said William W. Crawford held a first and paramount lien upon the $400,000 of second mortgage bonds of the Oregon-Washington Timber Company, numbered from 1 to 400, both inclusive, and in refusing to direct and decree a sale of said last mentioned bonds.

XXV.

The said Court erred in holding that the property acquired by H. E. Collins, as Receiver of the Washington Northern Railroad Company and des-

cribed in the decree should be first sold and that the proceeds of the sale of said property should be applied to the payment of the Receiver's certificates.

XXVI.

The Court erred in adjudicating by its decree that the first mortgage given by the Oregon-Washington Timber Company under date of June 4, 1910, to the Mississippi Valley Trust Company secured the same debt as that evidenced by the mortgage and bonds of the Washington Northern Raliroad Company of date June 4, 1910.

XXVII.

The said Court erred in holding that the complainants were entitled to recover their costs and disbursements of the defendant William W. Crawford, trustee.

XXVIII.

The said Court erred in decreeing that $1500 of the $4500 paid to the Mississippi Valley Trust Company by the Oregon-Washington Timber Company, under the sinking fund provisions of the mortgage should be retained by the complainants for their use, and in holding that the remainder of said money be paid by the Mississippi Valley Trust Company to H. E. Collins to be applied by him pro rata on the indebtedness of the receivership.

XXIX.

The said Court erred in holding that under the provisions relating to after acquired property contained in the mortgage executed under date of June 4, 1910, by the Washington Northern Railroad Company to the Mississippi Valley Trust Company the Washington Northern Railroad Company acquired the $400,000 of first mortgage bonds of the railroad company numbered from 601 to 1000, both inclusive, and that such bonds became subject and subordinate to the lien of the first mortgage bonds numbered from 1 to 600, both inclusive, described in said mortgage dated June 4, 1910.

XXX.

The said Court erred in holding that it was the intention of all of the parties at the time of the execution of the Crawford mortgage to make the security given for said mortgage subject to the $600,000 mortgage bonds sold and delivered by the Mississippi Valley Trust Company.

XXXI.

The said Court erred in holding and decreeing that certain timber lands acquired after the execution of the mortgage of June 4th, 1910, by the Oregon-Washington Timber Company to the Mississippi Valley Trust Company became subject to the lien of said mortgage.

ARGUMENT.

Motion of Complainant to Strike from Answer and Cross-Complaint of Appellant:

The third assignment of error embraced the motion to strike from the answer and cross-complaint of the appellant. We shall first direct the attention of the Court to the motion to strike from the answer (Tr. pp. 163-166). This motion is directed against two contentions set forth in the answer: a.—the allegations to the diversion from the amount to be realized from the sale of the first mortgage bonds of the Oregon-Washington Timber Company of the sum of $170,000, invested in timber lands of the timber company and of the sum of $100,000 invested in camp and logging equipment of the Oregon-Washington Timber Company instead of the application of these funds to the purposes agreed upon at the time all of the bonds of the railroad company and the timber company were issued under the mortgages of June 4th, 1910, which purposes are set forth in the contract of June 4th, 1910, found on pages 76 to 80 of the Transcript; and b.—the allegations of the answer relating to the diversion of the sum of $150,000 represented by bonds Series "B", secured by a deed of trust dated January 30th, 1911, executed by the Washington Northern Railroad Company, the Oregon-Washington Timber Company and

the Blazier Timber Company to the Mississippi Valley Trust Company. (Defendant's Exhibit D-1, Tr. p. 249).

The Washington Northern Railroad Company issued $1,000,000 of bonds secured by a deed of trust to the Mississippi Valley Trust Company. The Oregon-Washington Timber Company issued $600,000 of first mortgage bonds secured by a deed of trust to the Mississippi Valley Trust Company, and $400,000 second mortgage bonds secured by a deed of trust to the same company. The railroad company sold its entire issue of bonds to the timber company and was to receive in payment therefor $540,000 in cash and $400,000 of second mortgage bonds of the timber company secured by $400,000 of the first mortgage bonds of the railroad company. The resolutions of both the railroad company and the timber company, set forth in the answer, and the agreement of June 4th, 1910, provided that the $540,000 should be deposited with the Mississippi Valley Trust Company for the purposes specified in said agreement. $250,000 was to be used for extensions, betterments and equipment of the railroad company's property; $150,000 to take up the first mortgage of the Cape Horn Railway Company; $125,000 for the payment of a floating indebtedness of the Cape Horn Railway Company

(which was the same company as the Washington Northern Railroad Company) and for the other purposes specified in said agreement.

As alleged in the answer, $175,000 of this money was not devoted to the purposes specified in the agreement, but was used to acquire additional timber lands for the Oregon-Washington Timber Company, and $100,000 was paid out for logging equipment and camps of the timber company.

It is alleged in the answer that this diversion of the funds was made under the direction of the syndicate which acquired the $600,000 of first mortgage bonds and which now owns and holds $300,000 of the $570,000 of bonds represented by the complainants in this action (Tr. pp. 81-84).

This diversion could not have been accomplished except through the active assistance of the Mississippi Valley Trust Company, one of the complainants in this action. The $300,000 of bonds now held by the same parties who brought about this diversion of funds are not held by innocent purchasers and acquired in the ordinary course of business. The complainants are merely the representatives of these bondholders. By the deposit with the Mississippi Valley Trust Company of the $540,000 realized from the sale of the bonds a trust was created, of which the Mississippi Valley Trust Company

was the trustee, and the actions of the Mississippi Valley Trust Company were dominated and controlled by the syndicate above referred to, and this money was diverted from its proper use by the collusion, connivance and fraudulent acts of the complainant Mississippi Valley Trust Company and the holders of $300,000 of the bonds now represented by the complainants and in violation of the fiduciary relation which the trust company and the syndicate owed to them and the future holders of the $400,000 of the first mortgage bonds of the railroad company which were claimed by the appellant to be of equal rank with the $600,000 of bonds of the railroad company.

The timber company and the syndicate had assumed by virtue of their action to apply the $540,000 in a manner that would innure to the benefit and enhance the security of the bonds of the railroad company. Instead of doing this they gave the money to the timber company an entirely different and distinct corporation from the railroad company.

It is true that the $540,000 was deposited with the trust company to the credit of the railroad company, but all of the stock of the railroad company, as alleged in the answer was owned by the syndicate, and a majority of the officers and directors of the railroad company were members of the syndicate,

some of whom were officers of the trust company (Tr. pp. 81-86). The railroad company is in the same position as though it had never received the $175,000 and the $100,000 so diverted, as stated in the answer. The railroad company, in legal effect, never received from the sale of the bonds that portion of the $540,000 that was diverted to the purposes of the timber company. The purchasers of the bonds have never paid the amount they agreed to pay for the bonds and there has been a partial failure of consideration to the extent of at least $275,000. The situation of the bondholders represented by the complainants is the same as though the $275,000 agreed to be paid for the bonds had never been paid.

Assume that the complainants admitted that the purchasers of the bonds had agreed to pay $540,000 for the bonds and they had not paid that sum by the sum of $275,000. Then there could be no doubt in the mind of the Court that, not having paid for the bonds, the trustees, as their representatives, would not be entitled to foreclose the mortgage for the $275,000 of bonds not paid for, and yet that is substantially the position of the holders of the $570,000 of bonds now represented by the complainants. They may have gone through the formality of depositing the money with the Mississippi Val-

ley Trust Company, but they immediately took the money away from the trust company and actively diverted it to other purposes. There has been a failure of consideration in any event, which can always be set up as a defense to the bonds.

We do not contend that that portion of the $570,000 bonds held by innocent purchasers could be precluded from having the mortgage foreclosed as to the bonds held by them. But whether the matter be viewed as one of failure of consideration or one of fraud on the part of the trustee company and the present holders of $300,000 of bonds, or whether it be regarded as a breach of duty by the trustees to the holders of the bonds secured by the three mortgages, there can be no question but that the complainants ought not to be permitted to enforce a lien upon their bonds unless they first account and give credit for the $275,000 of funds diverted through their fraudulent, collusive and conniving acts, and such fraud and collusion is clearly set forth in the answer.

It is alleged in the answer that the appellant Crawford, at the time he acquired the $400,000 of first mortgage bonds of the Oregon-Washington Timber Company secured by the $400,000 of first mortgage bonds of the railroad company had no knowledge of the diversion of these funds. The $400,000

of bonds of the railroad company were negotiable instruments, acquired by Crawford in good faith for value in the ordinary course of business and he was an innocent purchaser of such bonds. The trust company and the members of the syndicate who controlled the trust company as well as the railroad company, agreed that the $540,000 of railroad bonds should be devoted to specific purposes. They owed a duty to Crawford, or to the holders of the $400,000 of railroad bonds and the $400,000 of the timber company second mortgage bonds to carry out this agreement and apply the money in accordance therewith. They occupied a fiduciary relationship to the holders of these bonds when negotiated, and it would be unconscionable and unjust to permit them to enforce against the security of the Washington Northern Railroad Company and the Oregon-Washington Timber Company the amount of the bonds held by them, when they never in fact paid over the money to the railroad company and paid it over to another party in disregard of the rights of the holders of the $400,000 of first mortgage bonds of the railroad company, represented by the appellant Crawford in this action.

It is a fundamental principle of law that a trustee is charged with the duty of disposing of property entrusted to him for a specific purpose ac-

cording to the terms of his trust, and that if he does not do so he becomes personally liable for any injury that may result.

Now the trustee, according to the allegations of the answer, was controlled and dominated by the members of the syndicate, and when they come into a court of equity and ask aid of that court they ought to be required to come in with clean hands, and at least ought to be required to show that they had paid the money to the railroad company in some way. According to the allegations of the answer it is manifest that the railroad company never received one dollar of the $275,000 so diverted, as stated in the answer (Tr. pp. 85-86).

The Court can readily see how vitally the failure to carry out the agreement to apply this money according to the contract affects the interests of the appellant Crawford. If the money had been invested in extensions and betterments of the railroad the assets of the railroad company would have been increased over and above what they are by the sum of $275,000. Crawford owns $400,000 of the first mortgage bonds of the railroad company,—bonds that were issued at the time the $600,000 of bonds were issued, and of the same rank, as we shall hereafter contend, and he would have been entitled to share in the assets of the railroad company in the

same proportion that his $400,000 of bonds bears to the amount of bonds included in the $600,000 amount. Moreover, the trustee had this $275,000 under its control. It has never paid it to the railroad company. In legal effect the trustee still has that money, and it should be required as trustee to account for it and the money treated and considered as an asset of the corporation, and should be considered and treated as a fund to be applied, with the interest thereon, toward the liquidation of all of the bonds.

But it will be contended that the effect of the transactions alleged is not to create a defense to the foreclosure suit but to create a debt owing by the timber company to the railroad company, coupled with a right on the part of the railroad company to assert an equitable charge or lien for this debt on the property purchased for the timber company.

We cannot agree with counsel that the effect of the transaction is to create a debt owing by the timber company. The trustee and the bondholders, instead of paying the $275,000 to the railroad company, which they had agreed to do, paid it over to the timber company, and the security under the $400,000 of first mortgage bonds of the railroad company, held by Crawford, is reduced by that amount and it is proper for a court of equity to

determine the respective priorities of lien, and it seems to us it does create a defense to the extent of the diminution of the security, to the foreclosure suit.

It may be contended that the defense is essentially an allegation of *ultra vires* and that this contention is not available to a creditor, and especially not available to a creditor whose debt was not in existence at the time of the facts complained of.

It was not the act of the railroad company that deprived Crawford of the $275,000 of assets applicable towards the payment of the $1,000,000 of bonds of which he acquired $400,000, but it was the wrongful act of the trustee and the present bondholders, who diverted the security which they held for the security of Crawford's $400,000 of railroad bonds from the railroad company to the timber company. It is true that a general creditor has no right to plead the *ultra vires* acts of a corporation, but this does not apply to judgment creditors or to lien creditors, and in this case it seems to us that Crawford occupies the position of the holder of the $400,000 first mortgage bonds of the railroad company and is complaining that the other bondholders did not pay over to the railroad company the amount of the purchase price of the bonds, but gave it to another party, and it cannot be said that one bond-

holder cannot raise a question as to the relative rank and priority of liens. Crawford claims under the first mortgage of the railroad company, and it is one of the usual functions of a court of equity, when it has the custody and control of property subject to liens, to settle and determine the relative rank and priority of these liens; and while Crawford was not a creditor of the company on the 4th of June, 1910, when the bonds were issued by the railroad company, or when the money was diverted, still the bonds are of a negotiable character and he acquired them for value and is an innocent purchaser and holder of these bonds, and he contends in his answer that it would be inequitable and unjust to adjudicate his lien under his $400,000 of bonds to be of equal rank with that of the bondholders represented by the complainants, who have never paid the purchase price of their bonds to the extent of $275,000, and that there is a failure of consideration to that extent.

Crawford was not a creditor on June 4th, 1910, but when he purchased a negotiable instrument issued on that date his rights related back to the time of the issuance of the $400,000 of bonds, and he was entitled to be treated in the same way as though he had acquired the $400,000 for value, as an innocent purchaser, on June 4th, 1910.

It will also be contended that the defense is one of set-off or counterclaim, and that the Washington Northern Railroad Company had an election whether to assert this set-off or counterclaim in the case at bar, and that a subsequent mortgagee has no right to assert this election for it.

The rights of Crawford relate back and take effect from the date of the issuance of the $400,000 first mortgage bonds by the railroad company. His lien arose at that time, and the answer pleads that the bondholders represented by the complainants are estopped from asserting their claim for the full amount of their bonds for the reason that there has been a partial failure of consideration to the extent of $275,000. It is true Crawford has a second mortgage upon the assets of the Washington Northern Railroad Company and the Oregon-Washington Timber Company; but in addition to the second mortgage upon the tangible property, he also, by virtue of that instrument, took an assignment of the $400,000 first mortgage bonds of the railroad company and took these bonds as negotiable instruments and as an innocent purchaser, and took them as they were at the date of their issue, and he holds his lien, about which he is complaining, not on the strength of his second mortgage but upon the strength of the lien created in his favor by the instrument of June 4th,

1910; and the $400,000 mortgage bonds of the railroad company constitute a first lien upon the property of the railroad company; and we contend that it is inequitable and unjust, and that the bondholders who failed to pay the purchase price of the bonds to the railroad company are estopped to share and participate in the security left until they pay the purchase price of the bonds according to their agreement, or until they account for the same.

Crawford's security for the $400,000 of railroad first mortgage bonds constitutes a lien which he is seeking in a court of equity to protect. His right as a lienor under said bonds is being infringed and he is asking the aid of a court of equity to adjudicate and determine the relative priority of the bonds issued under that instrument, and it is a right that belongs to him as a lienor, and the power to exercise that right cannot be taken away from him by any action on the part of the railroad company.

The real gist of the defense is that the securities pledged have been diverted by the trustee and the bondholders it represents; that they never paid the purchase price of the bonds to the railroad company; that they are not holders for value, and ought not to be permitted to enforce in equity a claim upon the bonds for which they have never paid. Even if it be treated as a set-off or counterclaim, then under

the 30th Equity Rule it is a defense that arose out of the transaction which is the subject matter of the suit.

The subject matter of the suit is the foreclosure of a deed of trust securing bonds, and the $400,000 of railroad bonds are of equal rank, according to the trust deed, with the $600,000 in part represented by the complainants, or the persons whom the complainants represent, according to the answer. The relative rights of the holders of the security is the question involved and the claim that we assert as a defense is one growing out of the transaction of issuing and negotiating the bonds in question. It is not a claim at law but a claim cognizable in a court of equity, which always has the power to determine the method in which securities shall be adjudicated with reference to priority.

It will be contended that the claim admittedly affects only a portion of the bondholders. Assuming that this is true, it is not inequitable to have the question of the relative rank of the bonds secured by the instrument sought to be foreclosed determined in this action. The effect of this contention on the part of counsel is this: That the rights of the holders of valid bonds will be injured by the court adjudicating that other bonds of supposedly equal rank are invalid. Suppose one-half of the bonds

represented by the complainants are held by this Court to be unenforceable. Can it be said that the rights of the remaining bondholders represented by the complainants would not be benefitted by an adjudication that one-half of the bonds not held by them are invalid? The delay caused by the litigation, if successful, would be more than compensated for by the amount they would ultimately receive from the securities which are admitted by all parties to be wholly insufficient to pay all the bondholders in full.

It will also be contended that Crawford took his mortgage expressly subject to the mortgage of June 4th, 1910, executed by the railroad company to the Mississippi Valley Trust Company, and also subject to the mortgage of the Oregon-Washington Timber Company to the same trust company. It is true the mortgage states that it is subject, so far as the property described is concerned, to the lien of the two mortgages; but, as we shall attempt to show, Crawford acquired title as an innocent purchaser of $400,000 of these first mortgage bonds of the railroad company, and as the holder for value, without notice, of these $400,000 of first mortgage bonds, he is attempting to protect his rights as a lien holder under such bonds, and the doctrine of the cases which will be cited by counsel to the effect

that a second mortgagee, who takes his mortgage subject to a prior mortgage, cannot question the validity of the bonds secured by the first mortgage, has no application.

The mortgage taken by Crawford in 1912 recognized that it was a second mortgage insofar as the property described therein is concerned; but the mortgage operated as an assignment to Crawford of the $400,000 of first mortgage bonds of the railroad company, and as the holder of such bonds he did not waive his right to be treated as any other innocent holder of the same bonds for value.

This matter is discussed in Section 848 of Volume 3 of Cook on Corporations, and under the authorities there cited the doctrine that will be contended for by counsel for complainants has no application.

A general creditor will not be permitted to raise the defense we are asserting here; but Crawford is not a general creditor; he is the holder of a valid lien, of the same rank with the valid bonds represented by complainants. But under the authorities even a general creditor can raise an objection such as we are raising, if he first reduces his claim to judgment, even after the foreclosure has been completed.

In *Drury vs. Cross*, 7 Wallace, 299, a

general creditor at the time of the foreclosure sale, but who became a judgment creditor after the sale, caused the sale to be set aside as fraudulent, on the ground that most of the bonds were issued without consideration and for the purpose of wrecking the company for the benefit of the directors. The case of *James vs. Railroad Company*, 6 Wallace, 885, is to the same effect. In that case the court, at the instance of the judgment creditors, set aside the sale because of the $2,000,000 of bonds on which the foreclosure was obtained less than $200,000 were *bona fide* and enforceable.

And in this case we contend that by the fraudulent acts and connivance of the holders of $300,000 and the trustee, the complainant is attempting to establish a lien for bonds claimed to have been sold for $275,000, the proceeds of which were not paid over to the railroad company in accordance with the agreement. It never could have been intended that the recognition by Crawford of the existence of prior mortgages would operate as a waiver upon his part of his rights as the purchaser of the $400,000 first mortgage bonds of the railroad company, which inured to him by virtue of the provisions of the deed of trust securing such bonds.

We shall now consider that portion of complainants' motion to strike the defense pleaded concerning

the $150,000 Series "B" bonds, issued on the 30th of June, 1911.

The Court will observe that on the 30th of January, 1911, the railroad company joined in a mortgage to secure the bonds known as Series "B" in the sum of $150,000 (Tr. p. 87), and at that time the stockholders and officers of the railroad company were the present and then holders of $300,000 of bonds represented by complainants, and which we are now contesting. There was absolutely no consideration for the issuance of these bonds. It is alleged in the answer that Series "B" bonds in the sum of $150,000 represented the purchase price of the stock of the railroad company sold by the syndicate and the present bondholders to one Blazier, an individual, and that the bonds were issued to cover the purchase price and executed by the railroad company, the timber company and the Blazier company.

It ought to be apparent to this Court that the Washington Northern Railroad Company, the Oregon-Washington Timber Company and the Blazier Timber Company had no power to issue bonds to pay the purchase price of the stock of the railroad company sold by the syndicate to an individual; yet that is the exact situation here, according to the allegations of the answer. After Series "B" bonds

in the sum of $150,000 had been issued and delivered to the syndicate and the present bondholders represented by the complainants, they were paid by the railroad company and the Oregon-Washington Timber Company; and at the time said bonds were issued all of the stock of the railroad company was held and voted by the members of the syndicate, the present holders of the bonds sought to be foreclosed in this action, and paid for by the companies securing the same, including the Washington Northern Railroad Company and the Oregon-Washington Timber Company, and the same was paid to the members of the syndicate at their instance and with the connivance of the Mississippi Valley Trust Company, who was also the trustee under the mortgage securing the $150,000 Series "B" bonds.

The appellant Crawford is entitled to have this sum off-set against the claim of the present bondholders to the extent of $150,000. If the allegations of the answer are true, and for the purpose of considering this motion they must be deemed to be true, these bondholders, controlling, as the answer alleges, the actions of the trustee, and virtually dominating the railroad company and the timber company, appropriated to their own use the assets of the companies covered by the mortgages given to secure the bonds held by them and held by the appellant Crawford.

The Mississippi Valley Trust Company is charged with having full knowledge of all of the facts relating to the issuance and payment of these bonds, and it acknowledged satisfaction of the deed of trust of January 30th, 1911, and acknowledged payment of these bonds. In legal effect the conniving bondholders and the Mississippi Valley Trust Company have in their possession to-day the $150,000 and interest realized from the payment of these bonds. If the allegations of the answer are true, and they must have been deemed true at the time the lower court granted the motion to strike, they took this money with full knowledge that they had no legal right to it and took it with full knowledge that the money constituted a part of the property securing the issue of bonds of the railroad company and the timber company. The Mississippi Valley Trust Company, knowing that the $150,000 of bonds were issued without consideration, nevertheless consented that the money used in paying for the same, which it held in trust for the benefit of the bondholders, should be turned over to the syndicate, the present holder of the bonds represented by complainants. The trustee, as we have heretofore urged, is charged with the duty of applying the trust funds in accordance with the provisions of the deed of trust; and the trustee who participated in this wrongful di-

version of the securities which it held under its various deeds of trust, is now seeking to take the balance of the property covered by the deed of trust in order to pay it over to these recreant bondholders, who have already received $150,000 as a trust fund for the protection and security of the bondholders, and at the instance of certain bondholders it takes these trust funds and pays them over to these bondholders, and now on behalf of these same bondholders seeks to enforce the bonds held by them against the remaining property. It does not make any difference what language may be used in the pleadings,—whether it be called a set-off or an affirmative defense requiring the complainants and bondholders to account for this money, the legal effect of it is the payment to the bondholders to the extent of $150,000. These bondholders, contrary to the provisions of the deed of trust, have received trust funds which they could not have received without the consent of the trustee, and equity and good conscience lead one to the inevitable conclusion that it must be treated and considered as a payment to that extent of the bonds held by them.

This of course assumes that the allegations of the answer could have been established by the proof, and the appellant was at least entitled to have that issue determined upon the facts.

Again, equity ought not to permit them to enforce their bonds when they are seeking to do such an unconscionable thing. They are estopped from asserting in a court of equity the claim upon their bonds when they have already received out of the property covered by the trust deed the sum of $150,000 in cash. They ought to be required to do equity before asking the aid of a court of equity. If the railroad company and the timber company had given to these bondholders $150,000 out of funds not covered by the mortgages or deeds of trust, there might be some plausibility in the opposing contention; but the deeds of trust, by their very language, cover all the property of every nature and kind owned by the companies at the time of their execution, as well as after acquired property, and these bondholders, with the knowledge that the funds they were taking were trust funds, with the active assistance of the Mississippi Valley Trust Company, appropriated the money to their own use, and it would be unconscionable for a court of equity to permit the syndicate and these bondholders, now represented by the complainants, to say to the Court: "We have taken $150,000 of the property covered by the mortgages in violation of the terms of the mortgages and intend to hold this money, to which we have no legal right, and at the same time we expect this court of

equity to render us such assistance as will enable us to participate in the proceeds of the sale of such assets of the company as we did not take."

When a trustee and those in collusion with him appropriate trust funds, it is the duty of a court of equity to compel a restoration of those trust funds so misappropriated before it permits them to share in the remaining assets of the corporations which are admittedly insolvent. Whether it be called a set-off, estoppel or payment, it is a defense well within the jurisdiction of a court of equity, and one that ought to be entertained by a court of equity.

The deeds of trust provided that the assets of these two corporations should be held and used for the payment of all of the bonds pro rata, and that all of the bondholders should be treated alike. Crawford owns $400,000 of the first mortgage bonds of the railroad company and $400,000 of the second mortgage bonds of the timber company, and as such holder he is entitled to raise the question and have the court determine what, if any, portion of the proceeds of the mortgaged property had been wrongfully appropriated by certain favored bondholders, with the active co-operation and assistance of the trustee, whose duty it was to see that the mortgaged assets in case of a foreclosure should be distributed among all of the bondholders pro rata. And Craw-

ford was entitled as one of the beneficiaries under the first mortgage of the railroad company and as the holder of the second mortgage bonds of the timber company, to have the relative value of his lien determined as against the other bondholders.

But it will be contended that a party collaterally interested in a set-off or counterclaim has no right to exercise the election of when to set it up, but that a second mortgagee may allege ordinarily any invalidity or informity in the plaintiff's cause of action.

Crawford's securities, covered by the deed of trust securing the $400,000 first mortgage bonds of the railroad company and the second mortgage bonds of the timber company, have been diminished by $150,000 wrongfully extracted out of the securities and paid over to these favored bondholders, who are now seeking to take the remaining assets. As the holder of the first mortgage bonds of the railroad company and the second mortgage bonds of the timber company, he has the right to ask a court of equity to refuse to permit bondholders of equal rank with himself to establish the lien of their bonds upon the assets remaining unless and until they shall have first accounted for that part or portion of the trust funds which they have wrongfully appropriated to their own use. In this case it is al-

leged in the answer that these bondholders (with the consent of the trustees) who are now seeking to establish their lien upon the remaining assets of the companies, have already diverted into their own pockets $150,000 of the securities described in and included under the trust deeds.

The railroad company cannot have any election about the matter. It is a defense that belongs to Crawford, because his security has been diminished by $150,000 which the bondholders represented by the complainants have fraudulently appropriated.

On the trial in the lower court counsel for appellees cited the case of *Bronson vs. LaCrosse*, 2 Wallace, 283, and will probably cite the same in this Court. In that case the facts were very different from those in this case. In the Bronson case the bonds of the first mortgage had already been negotiated and were in circulation in the business community, and the court held that the second mortgagee, whose mortgage by its terms was made subject to the first mortgage, could not contest the validity of the bonds. But in this case the bonds have not been negotiated but are in the hands of the original holders, who received them without consideration, and they have not been negotiated to the extent of at least $300,000. The Court in the Bronson case said that the bonds had been negotiat-

ed and that the holders were in the enjoyment of them prior to the execution of the third mortgage.

This case is different again from the Bronson case in that Crawford is claiming under his defense protection as the holder of the first mortgage bonds of the railroad company, and as such holder he occupies a position of equal rank with the holders of the valid bonds represented by the complainants. The Bronson case does not decide that the holders of some of the first mortgage bonds would be deprived of the right to have determined the priority of their liens with other holders of the bonds of equal rank, if such bondholders had already received out of the mortgaged property at least one-half of the amount of the face of the bonds they hold. And the same is true in the case of *Jerome vs. McCarter*, 94 U. S., 734. In the case of *Gillespie vs. Terrance*, 25 N. Y., 306, the Court makes a distinction which differentiates this case from that. In that case the surety sought to set up damages resulting from a breach of warranty as to the quality of certain timber. Here the bondholders represented by the complainants received the $150,000 out of the trust property and are seeking in a court of equity to enforce their claims for the full amount against the remaining property. And in this case as to the money diverted from the railroad company to the

timber company, referred to in the first part of the motion, there was a failure of consideration.

In the case of *Force vs. Age-Herald*, 33 Southern, 866, the facts are also entirely different from the facts alleged in this answer. There the question was one of *ultra vires* only. Here Crawford is asserting his rights as an innocent holder for value of $400,000 of the first mortgage bonds of the railroad company, and he is also asserting his position as a lien creditor and claims that as to one part of the motion, there was a failure of considertion, and as to the other portion of the motion there was a payment to the bondholders,—or at least there was a seizure by the bondholders,—of at least $150,000 of the mortgaged property pledged to the pro rata payment of all of the bonds secured by the deed of trust, and if they did receive $150,000 of the proceeds of the property covered by the mortgage they certainly should be estopped from insisting upon the payment of their entire indebtedness out of the remaining funds.

It will doubtless be contended by counsel that Crawford cannot complain about the diversion of any portion of the $540,000 proceeds of the bonds from the railroad company to the timber company for the reason that he is a creditor of both companies. Such contention does not appear to us to be

sound. It is true Crawford holds the first mortgage bonds of the railroad company and the second mortgage bonds of the timber company and holds the notes or bonds of all three companies; but his relative position as a lien holder is different in each case. The money that was diverted was money that belonged to the railroad company, and Crawford's rights were those of a first lienor so far as the property of the railroad was concerned, and it will not do to say that he should be deprived of his first lien, which may be sufficient to pay his claim in full, because he happens to have a second lien upon some other property. It is manifest from the allegations of the answer that the bondholders represented by the complainants, to the extent of $300,000 never paid to the railroad company the amount of the purchase price which they agreed to pay, but they did pay it to another and entirely different company. They represented all parties; they controlled the railroad company, the trustees and the syndicate; they had the whole matter in their hands; they deposited the money with the Mississippi Valley Trust Company under an agreement that it should go to the railroad company for specific purposes and provided that it could only be checked out upon checks signed by the railroad company, countersigned by the trust company; and they cannot be heard to say

that they ever paid the purchase price of the bonds according to the agreement with the railroad company, but they paid it to some other company. There was a failure of consideration and Crawford clearly had a right to raise this question and to have it determined upon the evidence.

As to the $150,000 of bonds, Series "B": These bondholders put their hands into the treasury of the railroad company and the other companies and took out that amount of money, and took it from property that was pledged for the protection of all of the bondholders alike.

The action of the Court in striking these allegations from the answer seems to us to have been erroneous, and the appellant Crawford ought to have been permitted to establish these facts by proof, and it must be presumed at this time and for this purpose that he could have done so, and that the allegations were true.

The lower court in its opinion (Tr. p. 317) seems to have been laboring under a misapprehension as to the facts relating to the claim of Crawford to the $400,000 of first mortgage bonds of the railroad company, and seems to have been under the impression that the appellant Crawford would not be entitled to these bonds until they were from time to time surrendered or paid under the terms of

the first mortgage. It is true that the first mortgage provides that when a bond is paid or taken up it should be surrendered or marked "cancelled" at the election of the railroad company: that is, when a timber company bond was paid a corresponding bond of the railroad company should be cancelled, or returned to the railroad company uncancelled (Crawford Mortgage, p. 18).

According to the complaint and answer $30,000 of the $600,000 first mortgage bonds of the timber company were taken up and bonds for the same amount delivered uncancelled to the railroad company. This $30,000 of bonds was therefore held by the railroad company uncancelled and under the Crawford mortgage was assigned to him as collateral security, and the lower court was possibly correct in holding that any bonds so taken up and reissued would be subject to the remaining portion of the $600,000 of bonds not taken up, and the cases cited by the lower court tend to support his conclusion as to this $30,000 of bonds, and we have no serious fault to find with the Court's opinion of it be limited to that portion of the $600,000 of bonds, to-wit, the $30,000 that were taken up by the timber company and returned uncancelled to the railroad company. However, that is not the matter that was before the Court, or that was embraced in

the motion to strike. The agreement of June 4, 1910, expressly provides as follows (Tr. p. 78):

"The $1,000,000 par value of your bonds hereby proposed to be purchased by us" (Oregon-Washington Timber Company) "are all to be executed and delivered by you" (Washington Northern Railroad Company) "to the trustee in the mortgage securing the same, and to be by said trustee duly authenticated, and $600,000 par value thereof to be deposited with the Mississippi Valley Trust Company of St. Louis, Missouri, to be by it held in trust as security under the terms of a certain first mortgage dated June 4, 1910, executed by us" (Oregon-Washington Timber Company) "to said Mississippi Valley Trust Company to secure an issue of $600,000 par value 6% gold bonds issued by us, and the remaining $400,000 par value of your bonds hereby proposed to be purchased are to be deposited with the said Mississippi Valley Trust Company to be by it held in trust as security under the terms of a certain second mortgage dated June 4th, 1910, executed by us to said Trust Company to secure an issue of $400,000 par value second mortgage 6% gold bonds issued by us, which latter $400,000 par value second mortgage bonds are the bonds hereinabove agreed to be sold and delivered to you."

This clearly shows that it was the intention to do two things:

First: The railroad company was to receive $540,000 in cash for the $600,000 first mortgage bonds as these bonds were sold for the $540,000.

Second: The $400,000 of second mortgage bonds of the timber company, secured by the $400,000 first mortgage bonds of the railroad company were deposited by the trustee as an entirely different

and separate transaction from the $600,000 issue.

We are unable to see the applicability of any of the authorities cited in the opinion of the lower court as to the $400,000 first mortgage bonds of the railroad company securing a like amount of bonds of the timber company to be deposited with the trustee, because they were two separate transactions, one relating to the sale by the railroad company of $600,000 of its bonds, the other relating to the $400,000 of bonds of the railroad company which were to be sold at some future date and to be used for an entirely different purpose. And we are unable to conceive by what process of reasoning the court should reach the conclusion that the $600,000 of first mortgage bonds of the railroad company numbered from 1 to 600 inclusive should be entitled to preference in payment over and above the $400,000 of first mortgage bonds of the railroad company from 601 to 1,000 inclusive. The mortgage of the railroad company of June 4, 1910, on the contrary expressly provides that the bonds shall be of equal rank, and we think the court was misled in reaching his conclusion upon the theory that the same rule applied to the bonds numbered from 601 to 1,000 inclusive as to the bonds that were returned to the railroad company from time to time as they were taken up by the timber company.

The relative rank of the $600,000 of first mortgage bonds of the railroad company numbered from 1 to 600 inclusive as compared with those numbered from 601 to 1,000 inclusive we shall further consider during the progress of our argument upon other assignments of error.

The motion to strike from the cross-complaint of Crawford (Tr. p. 168) involves substantially the same question as we have just discussed with reference to the motion to strike from the answer of Crawford and the same argument is applicable.

There is, however, one feature of the motion to strike from the cross-complaint that does not appear in the motion to strike from the answer.

The Mississippi Valley Trust Company and the Union Trust Company (Tr. p 168) moved to strike from the cross-bill the seventh paragraph, found on page 93 of the transcript. By this paragraph the appellant Crawford undertook to bring into the case and have made parties thereto Frank P. Hayes, William C. Little and others who constituted the syndicate referred to in the answer, which syndicate purchased the $600,000 first mortgage bonds and still owns the $300,000, according to the allegations of the cross-bills, which are now being foreclosed by the Mississippi Valley Trust Company. This syndicate also owned at the time of the transaction herein-

before referred to, all of the stock of the railroad company and dominated and controlled all of the actions of the Washington Northern Railroad Company, the Oregon-Washington Timber Company, the Blazier Timber Company and the Mississippi Valley Trust Company.

The appellant Crawford undertook to make the members of this syndicate parties to the suit, so that their rights and responsibilities could be determined in the one action. We think they were necessary parties,—or at least proper parties. If the Mississippi Valley Company in foreclosing the mortgages represented the bond holders then these gentlemen ought to have been in court and must have been in court before a court of equity would be justified in requiring an accounting from them.

We think the court erred in not permitting the members of the syndicate above named to have been made parties to the action.

Bonds Numbered 601 *and* 1,000 *Inclusive in the Sum of* $400,000 *of the First Mortgage Bonds of the Washington Northern Railroad of at least Equal Rank and Dignity with the* $570,000 *of Bonds Represented by the Mississippi Valley Trust Company*:

The provisions of the mortgage of the Washing-

ton Northern Railroad Company to the Mississippi Valley Trust Company, as well as the provisions of the bonds themselves, state that the bonds are all of like tenor, amount and date and that the payment of the principal and interest of all of said bonds is equally secured by the deed of trust (Complainants' Exhibit 8, page 3, Tr. p. 246).

The mortgage of the railroad company provides that the entire issue of 1,000 bonds should be of equal rank. 600 of them were sold first; the 400 remaining were to be sold at a later date. These 400 bonds were also payable at a later date.

In some jurisdictions it has been held that where a series of notes is secured by a real estate mortgage, the notes payable at different dates, the purchasers of these notes when negotiated are entitled to have their leins enforced according to the dates of negotiation. But the rule in the State of Washington is different and the Supreme Court of the State of Washington has held that all the notes secured by a mortgage are of equal rank, regardless of the dates of their negotiation or assignment.

In the case of *The First National Bank vs. Andrews,* 7 Wn., 261, it was held that:

"Where two notes executed at the same time but payable at different dates are secured by a mortgage upon real estate, the assignment of the notes to different parties does not give the assignee of the note first

maturing a priority in the proceeds of the mortgaged premises, but the assignees are entitled to share pro rata therein."

And the Supreme Court of Washington in the same case says:

"On the question of the priority of the assignees, an investigation of the authorities in this opinion would be profitless, for the rules announced by the courts are absolutely at variance and cannot be reconciled. There are, however, two general rules promulgated by the courts. The one established in a large number of states is, that where the notes are made payable at different dates and are assigned by the mortgagee, either with or without an accompanying assignment of the mortgage, the holder of the first note coming due has a prior right in the proceeds of the mortgaged premises. In other words, that the right of priority among the respective assignees was tested by the maturity of the respective notes. While a vast number of cases of equally respectable authority hold that, under the circumstances mentioned above, there is not preference given to the first note maturing, and that in the absence of expressed stipulation there is no priority in the case at all and that all the assignees are entitled to share pro rata in the proceeds of the mortgaged premises. * * * * The security was intended as much for the last note coming due as the first one. There seems to be no real reason why the relative position of the notes and mortgage should be changed because the ownership of the notes has changed. The value of the notes frequently depends upon the security. We think the more equitable and consistent rule is to leave their values undisturbed by their assignment."

The 600 bonds of the railroad company matured at ealier dates than the last 400 bonds, and the lower court in reaching the conclusion as announced in the

first opinion,—that the 600 bonds of the railroad company were entitled to be paid before the last 400 may have been due to the decisions referred to by the Supreme Court of Washington, and with which that court did not agree.

The Supreme Court of Washington expressly holds in the case last mentioned that it is the rule of local law in this state in regard to mortgages that all of the bonds, regardless of the dates of their maturity, are to be paid out of the security *pro rata* and that there is no preference in favor of the holder of the first maturing bond. And this court, in the matter of local laws affecting real estate mortgages is, of course, controlled by the decisions of the Supreme Court of the State of Washington, wherein the property covered by the mortgage in question is located.

The language of the railroad mortgage provides for a *pro rata* payment of the bonds and the Supreme Court of Washington holds that they must be paid *pro rata.*

There is nothing in the mortgages of the Washington Northern Railroad Company indicating that the bonds numbered from 601 to 1,000 inclusive occupied any inferior or subordinate position to the bonds numbered from 1 to 600 inclusive. Article 28 of the first mortgage of the Oregon-Washington Timber Company to the Mississippi Valley Trust Com-

pany (Complainants' Exhibit 9, Tr. p. 246) does contain this provision:

"ARTICLE 28: It is hereby further covenanted and agreed that as and when from time to time any of the bonds hereby secured are paid at maturity or on call, and cancelled by the trustee, a like amount par value of the bonds of the Washington Northern Railroad Company conveyed to and held by the Trustee under this mortgage deed of trust shall be cancelled by the trustee and returned to said railroad company or delivered uncancelled to said railroad company, at its option."

But this provision only relates to bonds paid to the dates of their maturity, or rather taken up at the dates of their maturity. There is no dispute as to the fact that the Washington Northern Railroad Company, the Oregon-Washington Timber Company and the Blazier Timber Company executed and delivered to Crawford the $425,000 of bonds referred to in the pleadings, and in the answer and cross bill of Crawford, and that these bonds have not been paid nor any part thereof. That by reason of the default of said obligors the entire sum became due and payable; and that the proper notice of the election of Crawford to declare the bonds due and payable was duly and regularly given. Neither is there any question involved in this case as to the proper execution of the Crawford mortgage, nor any question as to the Crawford mortgage constituting a first lien upon all of the property of the Blazier Timber Company. There is no dis-

pute or question about these issues and it was conceded at the trial that Crawford was entitled to a decree of foreclosure of his mortgage against all of the property of the Blazier Timber Company and against all of the property of the Washington Northern Railroad Company and the Oregon Timber Company; but of course the rank and priorities of the liens of complainants and cross-complainants are subject to dispute.

It is the contention of Crawford that there was assigned, transferred and conveyed to him by his deed of trust $400,000 of the second mortgage bonds of the Oregon-Washington Timber Company which carried with them $400,000 of the first mortgage bonds of the Washington Northern Railroad Company, which were held by the Mississippi Valley Trust Company as security for the payment of the $400,000 of second mortgage bonds of the Oregon-Washington Timber Company.

As such holder of the $400,000 of the bonds of the railroad company the appellant Crawford contends that he is entitled to participate *pro rata* at least with the holders of the $570,000 first mortgage bonds of the railroad company; that the Washington Northern Railroad Company issued $1,000,000 of first mortgage bonds; $600,000 of these first mortgage bonds were pledged to secure $600,000 of the first mortgage

bonds of the Oregon-Washington Timber Company, and $400,000 were pledged to secure the payment of the $400,000 of second mortgage bonds of the Oregon-Washington Timber Company, which Crawford holds as collateral security for his $425,000 of bonds; that $30,000 of the $600,000 first mortgage bonds of the railroad company were paid by the timber company and surrendered uncancelled to the railroad company in accordance with the terms of the mortgages of June 4, 1910. This $30,000 of bonds were also pledged to secure the bonds secured by the Crawford mortgage.

So far as the Washington Northern Railroad Company, the Oregon-Washington Timber Company and the Blazier Timber Company are concerned there can be no question but that they undertook to assign, transfer, pledge and convey to Crawford the $400,000 second mortgage bonds of the Oregon-Washington Timber Company and the $400,000 first mortgage bonds of the railroad company nor can there be any question as to the representations made by the railroad company and the Oregon-Washington Timber Company that they had the right to pledge these bonds. On page 18 of the Crawford mortgage it is said:

"That said $400,000 second mortgage bonds of the timber company were duly issued to and the rail-

road company is now the lawful owner of the same, and is authorized and empowered to use, negotiate, assign and pledge the same for its corporate purposes." (Complainants' Exhibit 11, p 18; Tr. p 247).

And again on the same page of the Crawford mortgage it is said:

"The railroad company does hereby sell, assign, pledge, transfer and set over to the trustee: (a) said $400,000 mortgage bonds of the timber company (b) the said $1,000,000 first mortgage bonds of the railroad company as they are from time to time released and delivered, or releaseable and deliverable, by the said Mississippi Valley Trust Company under the terms and provisions of the first and second mortgage deeds of trust, respectively, of the timber company."

And on page 24 of the Crawford mortgage the Oregon-Washington Timber Company states as follows:

"All of said first mortgage bonds of the timber company have been sold and issued and are now outstanding, and all of said second mortgage bonds of the timber company have been duly sold and issued and the railroad company is now the lawful owner thereof."

And again on the same page it is further stated:

"The timber company does hereby further sell, assign, pledge, transfer, and set over to the trustee" (Crawford) "all of its right, title and interest in, to and under its aforesaid $400,000 second mortgage bonds, and also said bonds of the railroad company as they are from time to time released and delivered, or releaseable and deliverable, under the terms and provisions of the first and second mortgage deeds of trust, respectively, of the timber company."

Again, on page 45 of the Crawford mortgage, it is said:

"* * * * And that the $400,000 second mortgage bonds of the timber company hereinbefore described and pledged and deposited hereunder as further and collateral security for the notes issued hereunder are not subject to the lien of any of said mortgage deeds of trust of the timber company and the railroad company, but are subject to the first and prior lien hereof."

No clearer or more exact language could have been used to express the manifest intention of the railroad company and the Oregon-Washington Timber Company that the lien of Crawford was a valid first and paramount lien, both upon the $400,000 of first mortgage bonds of the railroad company and the $400,000 of second mortgage bonds of the Oregon-Washington Timber Company, and we think the conclusion is necessarily forced upon the court that so far as the Washington Northern Railroad Company and the Oregon-Washington Timber Company could give a first lien upon the $400,000 first mortgage bonds of the railroad company and the $400,000 second mortgage bonds of the timber company, they established such a lien; and if the court reaches the conclusion that a first lien was established in Crawford's favor upon the $400,000 first mortgage bonds of the railroad company, then it follows that these bonds, owned by Crawford as pledgee, without con-

tradiction or dispute, are entitled to participate with the $570,000 of bonds of the complainants *pro rata* in the distribution of the proceeds of the sale of the property of the railroad company.

But it was contended in the lower court, and will doubtless be contended here, that the Crawford mortgage expressly provides that Crawford's lien for the $400,000 bonds should be subject to the prior mortgages by the Washington Northern Railroad Company and the Oregon-Washington Timber Company, and counsel will refer to certain provisions on page 44 of the Crawford mortgage, where it is said:

"It is hereby expressly declared that the lien of this indenture on the properties of the timber company and the railroad company is subject to the lien of those two certain first and second mortgage deeds of trust executed by the timber company and of that certain mortgage deed of trust executed by the railroad company to the Mississippi Valley Trust Company, trustee, as hereinbefore set forth, as to all the property covered by and to the extent stated in said respective mortgage deeds of trust; and all property mortgaged or pledged to the Mississippi Valley Trust Company, trustee, under said mortgage deeds of trust, and any and all such shares of stock, bonds, notes, or other obligations or securities delivered to said trustee under or pursuant to or in connection with said mortgage deeds of trust, shall be held, subject only to the prior lien thereof, subject to the lien and charge of this indenture for the security of the notes issued hereunder, all with the same force and effect as if the said property, shares of stock, bonds, notes and other obligations and securities had been

and were specifically included and described in the granting and pledging clauses of this indenture."

The court will bear in mind in connection with the above extract that Crawford under his mortgage not only included the $400,000 of first mortgage bonds of the railroad company and the $400,000 of second mortgage bonds of the timber company, but his mortgage included by specific description all of the real and personal property of the railroad company and the Oregon-Washington Timber Company, and the clause just quoted manifestly provides that the specific real and personal property described in the mortgage should be subject to the first and second mortgages of the railroad company and the timber company. But this does not militate against the position of Crawford, because Crawford, by virtue of his ownership of the $400,000 first mortgage bonds of the railroad company, became entitled thereby to be protected according to the provisions of the first mortgage of the railroad company to the Mississippi Valley Trust Company. It is true that Crawford's mortgage recognizes that the Mississippi Valley Trust Company would have the right to enforce its claim as trustee for all of the bonds secured by the mortgage of the railroad company, in which the $400,000 of bonds owned by Crawford were entitled to participate. All that can be said of the provision quoted

and other similar provisions of the Crawford mortgage is that Crawford was not entitled to have his bonds paid out of the proceeds of the sale of the physical property of the railroad company until the entire $1,000,000 of bonds secured by the first mortgage of the Mississippi Valley Trust Company had been paid; and we see nothing in the Crawford mortgage or in the evidence in this case that would lead the court to believe that it was the intention of all the parties that Crawford, the holder of $400,000 of the first mortgage bonds of the railroad company should not be entitled to participate in the proceeds of the sale of the properties of the railroad company.

The provision found on page 18 of the Crawford mortgage,—that the railroad company's bonds from time to time as released and delivered or releaseable and deliverable should become pledged to Crawford to secure his bonded indebtedness, certainly refers to the provision contained in the first and second mortgage bonds of the timber company and the railroad company,—that when a bond of the timber company was paid a bond of the railroad company for a similar amount should be released and delivered to the railroad company; but we fail to see the application of this clause to the $400,000 of first mortgage bonds of the railroad company held by the Mississippi Valley Trust Company as security for the $400,000 second

mortgage bonds of the timber company pledged to Crawford. Crawford already had assigned to him this $400,000 of bonds. The provision that he should have the bonds when released and delivered or releaseable and deliverable is meaningless as to the bonds already affirmatively pledged to him. We think the court must construe this provision as referring only to those bonds of the railroad company released from time to time by the payment of a corresponding number of bonds of the timber company. Crawford would not get bonds of this character until they were released, and there is nothing in the mortgage that gives him a right to those bonds until released by the payment of the timber company.

But the provisions of the Crawford mortgage show that he already had assigned, transferred, conveyed and pledged to him the $400,000 first mortgage bonds of the railroad company together with the $400,000 second mortgage bonds of the timber company, and such a provision as to the bonds already owned by him would be a useless thing. But if the court gives it the interpretation for which we contend, then it has a meaning, and that meaning is that when the $600,000 first mortgage bonds held by the Mississippi Valley Trust Company were released from time to time by the payment of a corresponding number of bonds of the timber company, Craw-

ford was to get these bonds, and the fact that $30,000 of the first mortgage bonds of the railroad company were turned over to Crawford by the Mississippi Valley Trust Company upon the payment of a corresponding number of bonds by the timber company clearly shows that this was the interpretation placed upon the contract, not only by the railroad company and the Oregon-Washington Timber Company, but also the interpretation placed thereon by the Mississippi Valley Trust Company, the complainant in this action.

The Mississippi Valley Trust Company never contended, until the institution of this action, that the holders of the $600,000 first mortgage bonds of the timber company and the $600,000 first mortgage bonds of the railroad company had any lien or claim of any kind whatsoever upon the second mortgage bonds of the timber company or the $400,000 first mortgage bonds of the railroad company; and it was stipulated (see deposition of Frederick Vierling, Tr. p. 276) that the $600,000 first mortgage bonds of the railroad company were pledged to secure the $600,000 first mortgage bonds of the timber company, and that $400,000 of the bonds of the railroad company were pledged as collateral security for the $400,000 second mortgage bonds of the timber company. Nowhere in the record is there any ground for insisting that

any of the parties ever understood that the $400,000 first mortgage bonds of the railroad company were subordinate to the $600,000 of bonds represented by the complainants in this action.

Moreover, the Mississippi Valley Trust Company was the trustee named in the mortgage of January 30th, 1911, executed by the Blazier Timber Company, the Oregon-Washington Timber Company and the Washington Northern Railroad Company, and in this mortgage which was given to secure $250,000 of bonds, the railroad company and the Oregon-Washington Timber Company pledged to the Mississippi Valley Trust Company the identical $400,000 of first mortgage bonds of the Washington Northern Railroad Company and the $400,000 of second mortgage bonds of the Timber Company, in which it is stated as follows:

"That the $400,000 of first mortgage bonds of the railroad company are a part of an issue of $1,000,000 of said bonds issued by said railroad company and secured by a first mortgage on said railroad property and equipment to the Mississippi Valley Trust Company as trustee."

And in the last paragraph of said mortgage, at page 50, it is said:

"The railroad company covenants that it is the owner of said second mortgage bonds of the timber company hereby conveyed as security, and has full authority and right to make this conveyance of the same."

This action of the complainant, the Mississippi Valley Trust Company, clearly demonstrates that on the 30th of January, 1911, long after the first mortgages were issued, it recognized the right of the railroad company and the timber company to pledge these bonds to it for an advance of $250,000, and the evidence shows that out of the proceeds realized from the Crawford mortgage this mortgage of $250,000 was paid to the Mississippi Valley Trust Company to satisfy the bonds secured thereby; so that it is manifestly apparent that the Mississippi Valley Trust Company, the complainant in this action, the Oregon-Washington Timber Company and the Washington Northern Railroad Company have all construed the contracts to mean that the $400,000 of second mortgage bonds of the timber company and the $400,000 first mortgage bonds of the railroad company were subject to sale, pledge and hypothecation by the Oregon-Washington Timber Company and the Washington Northern Railroad Company, and this mortgage of January 30th, 1911, and the amendatory mortgage thereafter executed have both been satisfied and the bonds secured thereby paid.

Can it be conceived that the Mississippi Valley Trust Company would have taken the $400,000 first mortgage bonds of the railroad company and the $400,000 second mortgage bonds of the timber com-

pany as security for these bonds had it not been the understanding and intention of all the parties that the railroad company and the timber company had a right to pledge them? And can it be conceived that the Mississippi Valley Trust Company would have caused the railroad company and the timber company to covenant that they did have the right to pledge these bonds, if it was contrary to the intention of all the parties at the time the arrangement was made with reference to the deposit of such bonds with the Mississippi Valley Trust Company?

The Mississippi Valley Trust Company in this action represents the bondholders and its interpretation of the meaning of the provisions of the deed of trust, so far as this action is concerned, is binding upon the bondholders represented by it, and it ought not now to be heard to contend for a different interpretation with reference to the right to pledge the $400,000 of first mortgage bonds of the railroad company than it has previously placed upon the matter.

The contract of June 4th, 1910, between the Washington Northern Railroad Company and the Oregon-Washington Timber Company contains the following provision:

"Said $400,000 par value of our" (timber company) "bonds so sold to you, however, or the proceeds of the sale thereof, to be used by you only for extensions, betterments or equipment to your railroad after

the expenditure of the said sum of $540,000 above mentioned."

It may be suggested that this provision would impose upon Crawford, or the bondholders represented by him, the duty of seeing to the application of the proceeds of the money advanced by him, and to see to it that said money went into extensions, betterments or equipment.

The railroad company and the timber company may have made such an agreement, but they would undoubtedly have the right to modify and cancel such an agreement. This they did, both in the execution of the Crawford mortgage and in the execution of the mortgage of January 30th, 1911, to the Mississippi Valley Trust Company.

Crawford advanced the money at the time the mortgage was executed, and that money has been shown to have been used in paying off the mortgage of January 30th, 1911, and this money went to the Mississippi Valley Trust Company, for the use and benefit of at least $300,000 of the $570,000 of bonds represented by the complainants in this action. It is certain, and the evidence so shows, that the mortgage was satisfied by the Mississippi Valley Trust Company.

There is nothing in the contract requiring the purchaser of the $400,000 of second mortgage bonds

of the timber company and the $400,000 of first mortgage bonds of the railroad company to see to the application of the money. That was a covenant between the railroad company and the timber company. If violated an action for damages might result. Crawford occupied no fiduciary relation with either the railroad company or the timber company, and he performed his whole duty when he paid the money over to them. The railroad company may have agreed with the timber company that it would use the proceeds of the sale of the bonds for betterments, extensions and equipment; but that is as between the railroad company and the timber company, and Crawford was under no duty nor obligation to compel the performance of any such agreement made between the railroad company and the timber company. He performed his whole duty when he paid the money over agreed to be paid by him for the bonds secured by his mortgage.

Moreover, the Mississippi Valley Trust Company, complainant in this action, participated in and consented to the diversion of the funds received by the companies from Crawford, if there was any diversion, because as the trustee under the mortgage of January 30th, 1911, it received at least $250,000 thereof, and satisfied the mortgage, and by reason of its action, as shown by the evidence in this case, it

certainly is now estopped, as the representative of the bondholders, from contending that the holders of the bonds represented by Crawford should be denied the right to participate in the proceeds of the sale of the property of the railroad company in the proportion that their $400,000 of first mortgage bonds bears to the $570,000 of bonds represented by the Mississippi Valley Trust Company.

We are unable to see anything in the record in this case that would estop Crawford from participating in the proceeds of the sale of the property of the railroad company, upon a *pro rata* basis with the $570,000 of bonds represented by complainants.

Moreover, the provision of the contract between the railroad company and the timber company of June 4th, 1910, above quoted as to the disposition of the funds realized from the sale of the second mortgage bonds of the timber company shows upon its face that it was a contract made between the railroad company and the timber company for the benefit of the timber company. There is nothing in the provision that indicates that it was intended to be for the benefit of any third party. Of course a contract can be made between two parties for the benefit of a third party, but the intention must be clear that it was for the benefit of a third person. This contract was not made between the bondholders and either the railroad

company or the timber company. The agreement relating to the sale of these bonds is found on page 134 of the transcript. That is the agreement between Little & Hays and the Oregon-Washington Timber Company, and there is no connection between the sale of the first mortgage bonds and the second mortgage bonds. The two contracts are entirely separate and distinct. Little & Hays had an option to handle the second mortgage upon a commission basis and failed to exercise that option. This Little & Hays contract also demonstrates to a certainty that the $600,000 first mortgage bonds of the railroad company were to be sold separately from the remaining $400,000 of railroad bonds.

"It is not every contract for the benefit of a third person that is enforceable by the beneficiary. It must appear that the contract was made and was intended for his benefit. The fact that he is incidentally named in the contract, or that the contract, if carried out according to its terms, would inure to his benefit, is not sufficient to enable him to demand its fulfillment. It must appear to have been the intention of the parties to secure to him personally the benefit of its provisions."

Sayward vs. Dexter Horton & Co., 72 Fed., 758.

Montgomery vs. Spencer, 50 Pac., 623.

The agreement was made between the railroad company and the Oregon-Washington Timber Com-

pany, and the manifest intention was to protect the timber company. It had other lands in the vicinity of the railroad and had a special interest in having the proceeds of the sale of the bonds used in making extensions to the railroad so as to enable the timber company to market its product. But the prospective bondholders had no interest in this particular investment of the proceeds of the sale of the bonds. It made no difference to the bondholders, and could make no difference to them, in what assets the money was invested. Neither does it appear that it was even incidentally for the benefit of the bondholders. The bondholders simply had a lien upon the property and they were only interested in seeing that the proceeds of the sale of the bonds should be invested in property that would come under the provisions of their mortgage; so it is undisputable under the records in this case that the Oregon-Washington Timber Company and the Washington Northern Railroad Company affirmatively consented to the pledging of the bonds to Crawford and they waived the foregoing provision as to the use of the funds, and that the Mississippi Valley Trust Company also waived the same, by taking a mortgage upon the same property long after the agreement was made. These are the only parties interested in the transaction. The contract was not made for the benefit of the bondholders; they are not

named in it, and are not interested in it; and the language and terms of the contract show that it was made solely for the benefit of the parties to the contract.

This position which we taken is entirely consistent with out contention as to the diversion of the $540,000, the money to be advanced for the $600,000 first mortgage bonds of the railroad company. There the railroad company was dominated, controlled and owned by a syndicate which now holds $300,000 of the same bonds. Again, it is different in that the Mississippi Valley Trust Company was charged with the duty of seeing that the money was paid out for certain purposes on checks signed by the railroad company and countersigned by the trust company. None of these features are applicable to Crawford's position.

After Acquired Property:

The lower court in its first opinion on the motion to strike held that the $600,000 of first mortgage bonds of the railroad company were superior to the $400,000 of bonds of the railroad company held by Crawford and that the $570,000 of bonds represented by the complainants must be first paid out of the proceeds of the sale of the property of the railroad company before anything could be paid on the remaining

$400,000 of the first mortgage bonds of the railroad company held by Crawford. This we have already discussed. This opinion of the court is found at page 305 of the transcript.

Upon the final hearing of the case and in the lower court's opinion at page 171 of the transcript, the court said:

"It is not necessary to determine whether the $400,000 of the railroad bonds, as acquired by the timber company before their sale by it to the railroad company, as collateral to the timber company's bonds, also sold, were of equal rank with the $600,000 sold and delivered by the trustee."

The reason assigned by the court for this change of view as to the relative priority and rank of the $570,000 of bonds represented by Crawford is based upon the clause of the mortgage relating to after acquired property (Tr. p 172).

The clause in the mortgage of the railroad company of June 4th, 1910, describing the property is as follows:

"All that certain railroad, together with rolling stock, equipment, estate and ownership, more fully described as follows:" (Then follows a description of the real property) "together with all spurs, switches, branches and extensions thereof.

"The grant is intended to include and shall include, all of the franchises, contracts, rights-of-way, easements, privileges, traffic agreements, rolling stock, cars and engines now owned by said company or which may hereafter be acquired by it and also

all rents, income, tolls and profits accruing and to accrue from its said business.

"It is the intention of these presents and it is hereby agreed, that all future acquired property, real or personal or mixed, including all future extensions, improvements or betterments of the property hereafter acquired by said company, shall be as fully embraced within the provisions hereof, and subject to the lien hereby created for securing payment of all of said bonds, together with interest thereon, as if the said property were now owned by said company and were specifically mentioned herein.

"Also all real property, timber and timber rights, and rolling stock of the railroad company of every kind and description, now owned or hereafter acquired and wherever situate, and all lands, tenements, hereditaments, buildings, structures, warehouses, workshops, mills, plants and fixtures; all machinery, engines and boilers; all documents, deeds, timber contracts and leases, maps, surveys, inventories and papers relating to the real estate and timber rights and contracts conveyed hereby, now owned or hereafter acquired; and all rents, issues and profits, earnings and income from the property hereby conveyed; it being the intention hereby to convey, and said railroad company does hereby convey, transfer and assign, all property of the above kind, nature and description, which it now owns and all which it may hereafter own or acquire in any manner."

It is contended by complainants, and the lower court held, that the second mortgage bonds of the timber company together with the first mortgage bonds of the railroad company in the sum of $400,000 when the railroad company acquired the bonds of the timber company, were brought under the provisions of the mortgage of the railroad company from the

time they were issued, under the "after acquired" clause in the mortgage of the railroad company of June 4th, 1910, given to secure the $1,000,000 of first mortgage bonds, of which $570,000 were held by complainants.

The whole scheme of financing the various companies contradicts this contension, because it is manifest that it never was the intention of the parties that the $400,000 of second mortgage bonds of the timber company and the $400,000 of first mortgage bonds of the railroad company were to be security for the payment of the $600,000 first mortgage bonds of the railroad company or of the timber company, because every portion of the record points to the fact that it was the intention to sell these second mortgage bonds of the timber company and the bonds of the railroad company to the public.

But they could not be brought under the provisions of the mortgage for another reason. Mortgages of after acquired property incidental or pertinent to the general business of the corporation may be brought under the provisions of a mortgage by an "after acquired" clause, such as in the mortgage of the railroad company. But the courts we think have uniformly held that the property that can be brought under the after acquired clause must be property necessary, incidental and appurtenant to the main

purposes of the corporation in the use of its other property. The mortgages of railroad companies usually cover the railroad, right-of-way, stations, warehouses, rolling stock and equipment, and generally contain the "after acquired" clause; but this clause, no matter how broad its terms, has been construed to be limited to after acquired property of a kind similar to that described in the mortgage, and necessary to and useful in the carrying on of the business in the use of the property that it then owns. Mortgages given by railroad companies are usually for long periods of time and the railroad equipment will wear out and new equipment take its place Mortgages containing a provision for after acquired property include all such replaced property of course, but the property that comes in under the provisions of the mortgage by virtue of the after acquired clause must be at least similar to the property described in the mortgage.

The mortgage of the railroad company of June 4th, 1910, may be searched from end to end and nothing will be found that can be construed to even remotely refer to the $400,000 of first mortgage bonds of the railroad company or the $400,000 second mortgage bonds of the timber company.

Mallory vs. Maryland Glass Co., 131 Fed., 111.

In that case the after acquired clause was:

"* * * * and also all the property, real, personal and mixed of the said Maryland Glass Company now owned by the said company or hereafter acquired by it, together with all improvements thereon and all rights and appurtenances appertaining thereto";

And the court said:

"It seems to me that the fair intention and meaning of that clause, under the circumstances of the case, may well be taken to mean the personal property in some way appurtenant to the fixed property of the company, and not the merchandise made for sale and being sold day by day."

A very excellent discussion of the question of after acquired clauses in mortgages is found in the case of *Mississippi Valley Trust Company vs. Chicago Railroad Company,* 58 Miss., 902. The provision of the mortgage in that case was as follows:

"All of its rights-of-way, lands, property, franchises, rights and appurtenances, and also all the buildings, structures and improvements thereon, and all the singular cars, locomotives, warehouses, depots, machine shops and machinery, fixtures, utensils and effects of every kind, nature and description whatever, in use upon said railroad way or in any wise attached or appurtenant to the same, intending hereby to include all its present real and personal estate and franchises now owned or hereafter to be acquired, without any exception or reservation whatever."

Notwithstanding the foregoing provision, which the court said was as broad as the English language could make it, it was held that the mortgage did not

include an hotel, storehouse, town lots and a farm of 300 acres; that the provision was too broad and too indefinite and became a nullity. The court further said that only such property would come in under the after acquired clause as was appurtenant to the property, and that the farm, hotel, etc., could not possibly be regarded as either necessary or legitimate to the business of the railroad company.

To the same effect is the case of *State vs. Glenn*, 1 Pac., Rep. 186; *Moran vs. Pittsburg Railway Company*, 32 Fed., 878.

Tested by the rules of law announced in the foregoing decisions, it must be plain to the court that mortgage bonds are not of a character similar to any of the property described in the mortgage of the railroad company, nor appurtenant to any of the property described therein and owned by the railroad company. Neither are they essential nor necessary to the railroad company in the use of the property of the company described in the mortgage. Similar provisions as to after acquired property are contained in the mortgage of the Oregon-Washington Timber Company, but the provision in this mortgage is even more restricted than the provision in the mortgage of the railroad company.

The $400,000 of the railroad company's first mortgage bonds and the $400,000 second mortgage

bonds of the Oregon-Washington Timber Company were intended to be sold for the purpose of buying other timber and equipment and were intended to be placed upon the market for sale to the public, and yet, if the conclusion of the lower court is correct, that these bonds passed under the after acquired clause and became subject to the $600,000 of first mortgage bonds of the railroad company such an intention on the part of all the companies and of the trust company would be completely frustrated. To take such a position as the lower court did contradicts the express language of the agreements for sale and is in direct conflict with the language of the mortgage of the railroad company and with the language of the bonds themselves. The provisions of the bonds and the provisions of the mortgage of the railroad company establish beyond doubt the fact that the entire $1,000,000 of bonds of the railroad company were of equal rank and dignity and in case of the sale of the property were entitled to participate in the distribution of the proceeds of the sale *pro rata.*

It is contended that the timber company acquired certain tracts of land after the execution of its mortgage of June 4th, 1910, and it is insisted that this property should come under the provisions of the mortgage of complainants executed to them by the Oregon-Washington Timber Company. If one piece

of property can be included then all of Skamania County might as well be included. The timber lands acquired were of course of a character similar to that of the property covered by the mortgage of the timber company, but they were in no sense appurtenant thereto, nor are they useful, necessary or essential to the timber company in the handling and carrying on of its business, and the authorities we have cited preclude the inclusion of this property under the provisions of the first mortgage of the timber company, or of the second mortgage of that company. But this after acquired real estate was acquired by the timber company prior to the execution of the Crawford mortgage, and is specially described in the Crawford mortgage, and we think that the Crawford mortgage is a first mortgage upon this after acquired property.

The court, however, in its opinion, says: (Tr. p. 174).

"If it was the intention that these $400,000 of railroad bonds should pass under the Crawford mortgage, free from the lien of the first mortgage, no good reason appears why they were not withdrawn from the custody of the Mississippi Valley Trust Company and delivered to the trustee under the Crawford mortgage when the latter was executed."

It does not seem to us that this suggestion is very forceful. The Mississippi Valley Trust Company simply held the $400,000 of railroad bonds as depositary or trustee. It had no active duties to per-

form as trustee. It was a mere naked trustee and held the bonds at all times subject to their disposition by the owner of the bonds, the Washington Northern Railroad Company. We fail to see any good reason for the withdrawing of the bonds by Crawford from the Mississippi Valley Trust Company. They were assigned, transferred and pledged just as effectively as though their actual physical delivery had been made. It must be conceded from the agreement under which the bonds were deposited with the Mississippi Valley Trust Company that they were subject to the control and disposition of the railroad company, and the railroad company in its mortgage to Crawford undertook to transfer all of its right, title and interest in and to the said bonds to Crawford as security for the bonds secured by his mortgage.

The lower court in its opinion (Tr. p 175) uses the following language:

"Not only is the intention shown in this first mortgage to cover such after acquired property, but an intention is also shown in the Crawford mortgage to recognize the facts that the prior mortgage does cover and include such property and that the latter —the Crawford mortgage—shall be subject to the other in such particular.

"The following appears in that mortgage, but it is not the only recital warranting a like construction:

'* * * * the railroad company does hereby further sell, assign, pledge, transfer and set over to the trustee; (a) said $400,000 second mortgage

bonds of the timber company; (b) the *said* $1,000,000 *first mortgage bonds of the railroad company as they are from time to time released and delivered, or releaseable and deliverable,* by the said Mississippi Valley Trust Company under the terms and provisions of the said first and second mortgage deeds of trust, respectively, of the timber company. * * * *

'* * * * it is hereby expressly declared that the lien of this indenture *on the properties* of the timber company and the railroad company is subject to the lien of those two certain first and second mortgage deeds of trust executed by the timber company and of that certain mortgage deed of trust executed by the railroad company to the Mississippi Valley Trust Company, trustee, as hereinbefore set forth, *as to all the property covered by and to the extent* stated in said respective deeds of trust; and all property mortgaged or pledged to the Mississippi Valley Trust Company, trustee, under said mortgage deeds of trust *and any and all such shares of stock, bonds, notes, or other obligations or securities delivered* to said trustee under or pursuant to or in connection with said mortgage deeds of trust, shall be held subject only to the prior lien thereof, subject to the lien and charge of this indenture for the security of the notes issued hereunder—all with the same force and effect as if the said property, shares of stock, bonds, notes and other obligations and securities had been and were specifically included and described in the granting and pledging clauses of this indenture' (the italics are the court's).

"There are no equities in the present case which would qualify in any way, this conclusion; nor any reason why this interpretation, placed upon the mortgage and recognized by the subsequent mortgagee, should not not obtain."

In the extract from the court's opinion is contained a quotation from the Crawford mortgage with

reference to the $400,000 of second mortgage bonds of the timber company and the $1,000,000 of first mortgage bonds of the railroad company, "as they are from time to time released and delivered or releaseable and deliverable by the Mississippi Valley Trust Company under the terms and provisions of the said first and second mortgage deeds of trust, respectively, of the timber company;" and the court says that because the Crawford mortgage recognizes the priority of the first mortgage Crawford must be held to have consented and admitted that his security, to the extent of $400,000 first mortgage bonds of the railroad company, and the $400,000 second mortgage of the timber company is subject to the prior lien of $570,000 of bonds represented by the complainants.

Such an interpretation by the court is unreasonable and indefensible. To give the language this effect is to nullify the provisions of the mortgage of the railroad company which expressly provides that the $1,000,000 of bonds shall be of equal rank and dignity; and yet the court says that $400,000 of the first mortgage bonds of equal rank with the first $600,000, becomes a part of the security for the $600,000 bonds, in direct conflict with the express terms and provisions of the deed of trust under which they were issued.

This interpretation is also at variance with the

plan of financing as contained in the agreement of June 4th, 1910, between the Washington Northern Railroad Company and the Oregon-Washington Timber Company.

The court will observe that this $400,000 of bonds were to be deposited with the Mississippi Valley Trust Company at the very same time the $600,000 of bonds were deposited, and in the agreement executed by the Washington Northern Railroad Company and the Oregon-Washington Timber Company, on June 4th, 1910, it is stated: (Tr. p. 132).

"* * * * said $400,000 par value of our bonds so sold to you, however, or the proceeds of the sale thereof, to be used by you only for future extensions, betterments or equipment to your railroad, after the expenditure of the said sum of $540,000 above mentioned."

If the $400,000 of second mortgage bonds of the timber company together with the $400,000 first mortgage bonds of the railroad company ever became subordinate to the $600,000 first mortgage bonds of the railroad company they became inferior and subordinate on the day of the execution of the agreement of June 4th, 1910, and yet that same agreement contemplates the sale of these bonds to the public to raise money for betterments for the railroad. Could it be that these parties expected or intended to convert into second mortgage bonds the $400,000 of first

mortgage bonds of the railroad company, issued on the same day as the $600,000 first mortgage bonds? There is nothing in the entire record that indicates any intention on the part of any of the companies to subordinate the $400,000 of first mortgage bonds of the railroad company to the $600,000 first mortgage bonds of that company. It was the manifest purpose to sell these bonds in the open market. Had they been sold in the open market and a purchaser had acquired them for value, then they would still have been a secondary security, if the opinion of the lower court is sound.

Had it been the intention of the parties to make the $400,000 first mortgage railroad bonds a secondary security and subordinate to the $600,000 first mortgage railroad bonds, why did not the railroad company issue two series of bonds instead of one? Why did they insert the provision that they did insert in the bonds themselves and in the mortgage, to the effect that these bonds were all of equal rank?

We cannot conceive of the bonds or notes of a company being brought under the after acquired clause in any mortgage. The bonds are the liabilities of the company and not its assets. Yet the reasoning of the court is to the effect that a company's own evidence of indebtedness is property and under the broad language of a trust deed becomes subject to

the mortgage and subject to the bonds that have been theretofore issued. That this cannot be so in this case is established to a demonstration by the fact that the mortgage itself of the railroad company provides that the $400,000 of bonds shall not be subordinate but shall be of equal rank and dignity with the $600,000.

Crawford paid $425,000 over to the railroad company in reliance upon these bonds. He certainly is a holder of the bonds for value. He is in the same position any individual would have been who bought the bonds from the railroad company and took an order for them upon the Mississippi Valley Trust Company, with whom they were deposited. to hold them as a naked trustee subject to the order of the railroad company which had the right to sell them at any time it saw fit.

From whatever point the question is viewed an intent is shown to make the security given for the Crawford mortgage,—the $400,000 of the $1,000,000 issue of first mortgage bonds of the railroad company, of equal rank with the $600,000 of bonds represented by the trustee in this action, and the language of the Crawford mortgage recognizing the priority of the first mortgages of the railroad company and the timber company can only be construed to be a recognition of the priority of the lien of these mort-

gages over the physical properties of the companies, and cannot, without doing violence to its language, be construed to be a recognition of the right of the Mississippi Valley Trust Company to have the $400,000 first mortgage bonds of the railroad company subject to the prior lien of the first $600,000 of the same issue of bonds.

The final decree contains this language: (Tr. p. 232).

"That the interest of the railroad company in the said 400 railroad bonds, immediately upon its acquiring of the same, became subject to the lien of the 600 railroad bonds then outstanding, and the said 400 railroad bonds could be, and were in fact, reissued by the railroad company only as inferior in dignity and subsequent in time of payment to the 600 bonds first negotiated and then outsanding."

The court will bear in mind that the railroad company issued the 400 railroad bonds at the same time it issued the 600 bonds and that the bonds were deposited with the Mississippi Valley Trust Company on the same day in pursuance of the agreement of June 4th, 1910, which expressly provides that the 400 railroad bonds should be sold and the proceeds used for betterments of the railroad company only. All of these transactions occurred simultaneously, and if this court will read the sale agreement of June 4th, 1910, and the syndicate agreement of June 4th, 1910, it will be forced to the conclusion that it was never the

intention of the parties to subject the 400 bonds to the 600 bonds.

Attorney's Fees and Costs:

The entire record shows that the Washington Northern Railroad Company and the Oregon-Washington Timber Company are hopelessly insolvent and will be able to pay a very small percentage of the outstanding bonds and we think that an attorney's fee of $33,250 for the foreclosure of each of these mortgages is excessive and unreasonable, and we do not see why the costs of the entire action should be taxed against Crawford. The action was brought to foreclose the mortgages of the Oregon-Washington timber company and the Washington Northern Railroad Company. They were the real defendants and the costs should have been taxed against the principal defendants instead of being taxed against Crawford.

Multifariousness in the Bill of Complaint:

The Court erred in permitting the complainants to foreclose the mortgage of the Railroad Company and the mortgage of the Oregon-Washington Timber Company in the same action and cause (Tr. p. 240).

The objection to the multifarious character of the bill of complaint is set forth in the answer of Crawford as follows: (Tr. pp. 64-65.)

"1. That said amended bill of complaint shows upon its face that two separate causes of action have been improperly united in said amended bill of complaint, and that said amended bill of complaint is multifarious, said amended bill of complaint embracing: (a) an action by the Mississippi Valley Trust Company to foreclose a mortgage executed by the Washington Northern Railroad Company to the Mississippi Valley Trust Company, Trustee, to secure an issue of bonds in the aggregate amount of $1,000,000; an action by the Mississippi Valley Trust Company and the Union Trust Company, Trustees, to foreclose a mortgage executed by the Oregon-Washington Timber Company, a corporation, to the Mississippi Valley Trust Company and the Union Trust Company to secure an issue of bonds of the Oregon-Washington Timber Company in the aggregate amount of $600,000, and that by so doing there is a misjoinder of the causes of action in said amended bill of complaint

"2. That there is a misjoinder of parties plaintiff in that the Mississippi Valley Trust Company, Trustee, under the mortgage of the Washington Northern Railroad Company, is joined in a complaint with the Mississippi Valley Trust Company and the Union Trust Company, Trustees, under the mortgage executed by the Oregon-Washington Timber Company.

"3. That there is a misjoinder of parties defendant in that the Washington Northern Railroad Company, which executed the mortgage upon the property of the railroad company to secure an issue of bonds by the railroad company, is joined as a defendant with the Oregon-Washington Timber Company, which executed a mortgage to the Mississippi Valley Trust Company and the Union Trust Company to secure an issue of bonds by the Oregon-Washington Timber Company.

"4. That the amended bill of complaint shows

upon its face that the Mississippi Valley Trust Company holds $570,000 of the bonds of the Washington Northern Railroad Company as collateral security for the payment of the bonds issued by the Oregon-Washington Timber Company, and the amended bill of complaint discloses an attempt to foreclose two separate mortgages executed by two different parties, involving two distinct subject matters, in one action, and that the causes of action so attempted to be joined are not joint; and the liability asserted against the Oregon-Washington Timber Company is distinct, separate and different from the liability asserted against the defendant, the Washington Northern Railroad Company, and sufficient grounds are not shown for uniting the said causes of action in order to promote the convenient administration of justice."

"The plaintiff may join in one bill as many causes of action, cognizable in equity, as he may have against the defendant. But where there is more than one plaintiff the causes of action joined must be joint, and if there be more than one defendant the liability must be one asserted against all of the material defendants, or sufficient grounds must appear for uniting the causes of action in order to promote the convenient administration of justice. If it appears that any such causes of action cannot be conveniently disposed of together, the court may order separate trials."

Rule 26, *Rules of Practice,* 198 Fed., XXV.

"Demurrers and pleas are abolished. Every defense in point of law arising upon the face of the bill, whether for misjoinder, non-joinder, or insufficiency of fact sufficient to constitute a valid cause of action, in equity, which might have heretofore been made by demurrer or plea, shall be made by motion to dismiss, or in the answer, and every such point of law going to the whole or material part of the

cause or causes of action stated in the bill may be called up and disposed of before the final hearing at the discretion of the court. Every defense heretofore presentable by plea in bar or abatement shall be made in the answer and may be separately heard and disposed of before the trial of the principal case in the discretion of the court. If the defendant move to dismiss the bill or any part thereof, the motion may be set down for hearing by either party upon five days' notice, and, if it be denied, answer shall be filed within five days thereafter, or a decree *pro confesso* entered."

Rule 29, *Rules of Practice*, 198 Fed. XXVI.

Judge Story defines multifariousness to be:

"The improperly joining in one bill distinct and independent matters, and thereby confounding them; as, for example, the uniting in one bill of several matters, perfectly distinct and unconnected against one defendant; or the demand of several matters of a distinct and independent nature against several defendants in the same bill."

Storey's Equity Pleading, 271.

Stafford Nat'l Bank v. Sprague, 8 Fed. Rep. 377.

"A suit cannot be maintained in equity on the ground of preventing a multiplicity of suits where the demands against each of the defendants, though of the same nature, are entirely distinct and unconnected with those against the other defendants. In such case each defendant can object to the joining of any distinct and unconnected causes of action."

Street's Fed. Eq. Prac., Sec. 426.

Hale vs. Allison, 188 U. S. 56.

"A bill will be considered multifarious if the distinct and separate claims made in it are so different in character that the Court ought not to permit them to be litigated in one suit. Two or more distinct objects cannot be embraced in the bill; its double character destroys it. Where two essentially different causes of action are joined that present no common question for litigation and require different proof, the bill is properly treated as multifarious, and a demurrer thereto should be sustained. A bill is multifarious where the plaintiff asserts two mutually antagonistic claims to relief."

Street's Fed. Eq. Prac., Sec. 432.

In this cause we have the anomaly of the complainants attempting to foreclose in one complaint two separate mortgages upon different properties, one mortgage executed by the Washington Northern Railroad Company to the Mississippi Valley Trust Company and the other executed by the Oregon-Washington Timber Company to the Mississippi Valley Trust Company and the Union Trust Company. The Washington Northern Railroad Company and the Oregon-Washington Timber Company are two separate and distinct corporations. The Union Trust Company and the Mississippi Valley Trust Company are the mortgagees in one of the mortgages and only the Mississippi Valley Trust Company is the mortgagee in the other. We have, therefore, two distinct plaintiffs against two separate and distinct defend-

ants. There is no justification for the procedure attempted in this action. If this procedure can be successfully followed without violating the equity rules for multifariousness then the holder of twenty mortgages executed to him by separate individuals could foreclose all of the mortgages in one action.

But the situation here is even worse. Here we have different defendants and different plaintiffs foreclosing in one action two separate mortgages upon different properties in no way connected with each other.

The appellant Crawford moved to dismiss the bill (Tr. pp. 159-161) upon the grounds above stated, which motion was denied by the Court, and then Crawford set the same up in the answer and the matter is now before this Court to determine whether the foreclosure of two separate mortgages by two separate individuals to two separate and distinct plaintiffs can be joined in one action.

We think the action of the lower Court in permitting the foreclosure of these two mortgages was clearly erroneous and the bill should have been dismissed upon the ground of multifariousness as above stated.

For the foregoing reasons we contend that the bill should be dismissed, or that the decree should be

modified in accordance with the contentions we have set forth in our brief.

Respectfully submitted,

J. A. KERR,

E. S. McCORD,

Solicitors for Appellant.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

William W. Crawford, Trustee, *Appellant,*

v.

Washington Northern Railroad Company, Oregon-Washington Timber Company, Blazier Timber Company, Mississippi Valley Trust Company, and Union Trust Company, *Appellees.*

Appeal from the District Court of the United States for the Western District of Washington, Southern Division.

HONORABLE EDWARD E. CUSHMAN, *Judge*

APPELLEES' BRIEF

Kerr & McCord, *Solicitors for Appellant.*

Edward C. Wright, Huffer & Hayden, Snow and McCamant, *Solicitors for Appellees.*

CLARKE-RUNDELL PRINTING CO., PORTLAND

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

William W. Crawford, Trustee, *Appellant,*

v.

Washington Northern Railroad Company, Oregon-Washington Timber Company, Blazier Timber Company, Mississippi Valley Trust Company, and Union Trust Company, *Appellees.*

Appeal from the District Court of the United States for the Western District of Washington, Southern Division.

BRIEF OF APPELLEES MISSISSIPPI VALLEY TRUST COMPANY AND UNION TRUST COMPANY.

This is a suit brought for the foreclosure of two mortgages given on the 4th of June, 1910, to the Mississippi Valley Trust Company to secure a single debt. One of the mortgages was executed by the Washington Northern Railroad Company and the other by the Oregon-Washington Timber Company. There is but little dispute as to the facts and the differences between us

grow out of the inferences and legal conclusions to be drawn from facts which are substantially admitted.

On the 4th of June, 1910, the Oregon-Washington Timber Company was the owner of timber lands in Skamania County, Washington, specifically described at pages 104 and 105 of the printed record, and aggregating 10,800 acres, with a stumpage thereon supposed at that time to aggregate 397,000,000 feet of merchantable timber. On the 4th of June, 1910, it executed two mortgages on this timber land, a first mortgage of $600,000.00, and a second mortgage for $400,000.00. Both of these mortgages ran to the Mississippi Valley Trust Company, a corporation doing business at St. Louis, Missouri. The mortgages are in evidence respectively as Complainants' Exhibit "9" and Complainants' Exhibit "10". There was a provision in the first mortgage to the effect that by proceedings therein defined a second trustee might be named to share the duties and responsibilities assumed by the Mississippi Valley Trust Company. Pursuant to such stipulation arrangements were subsequently made whereby the Union Trust Company of Detroit, Michigan, became co-trustee with the Mississippi Valley Trust Company (record 287). The debt secured by the first and second mortgages of the Oregon-Washington Timber Company was evidenced by negotiable bonds each in the sum of $1,000.00, six hundred of such bonds being issued to evidence the debt secured by the first mortgage and four hundred of them to evidence the debt secured by the second mortgage.

The Washington Northern Railroad Company was the owner of a logging railroad running from the Columbia River back into the timber owned by the Oregon-Washington Timber Company, its track aggregating about twenty-three miles. It was owned and controlled by substantially the same stockholders as those who owned and controlled the Oregon-Washington Timber Company (Collins 262). On the 4th day of June, 1910, the Washington Northern Railroad Company executed a mortgage in the sum of $1,000,000.00 to the Mississippi Valley Trust Company. The debt secured by this mortgage was evidenced by one thousand bonds, numbered 1 to 1,000 respectively, each for the sum of $1,000.00.

For convenience we will hereafter in this brief speak of the Oregon-Washington Timber Company as the Timber Company and the Washington Northern Railroad Company as the Railroad Company. When we have occasion to mention the Blazier Timber Company we shall refer to it as the Blazier Company.

There was a provision contained in the two mortgages given by the Oregon-Washington Timber Company to the effect that the payment of one of the bonds of the Timber Company should have the effect to pay and retire one of the bonds of the Railroad Company, the papers thus evidencing the fact that the mortgages of the respective corporations were given to secure the same debt.

The Railroad mortgage is in evidence as Complainants' Exhibit "8". On the same day that the mortgages

were executed the Timber Company made a proposition to the Railroad Company for the purchase of the Railroad Company's bonds and this proposition was accepted by the Railroad Company. The proposition is in evidence as Complainants' Exhibit "13" and is in words and figures as follows:

"Portland, Oregon, June 4th, 1910.

Washington Northern Railroad Company,
Portland, Oregon.

Dear Sirs:

We understand that you are proposing to make certain extensions to your railroad (formerly owned by the Cape Horn Railroad Company), the result of which will be to increase our facilities for marketing the timber from our lands in Skamania County, Washington, and that you have authorized an issue of One Million Dollars ($1,000,000.00) par value first mortgage six (6) per cent gold bonds, dated the 4th day of June, 1910, due on the first day of May, 1928, and secured by a first mortgage on your railroad property.

We propose to buy from you the entire issue of One Million Dollars ($1,000,000.00) par value of said bonds and pay you therefor Four Hundred Thousand Dollars ($400,000.00) par value of our bonds, as hereinafter described, and the sum of Five Hundred and Forty Thousand Dollars ($540,000.00) in money, said money to be used for the following purposes:

One Hundred and Fifty Thousand Dollars ($150,000.00) to be used for the present or future payment or retirement of the outstanding first mortgage for One Hundred and Fifty Thousand Dollars ($150,000.00) now on your railroad property, which mortgage is now pledged as additional collateral to secure the payment of a first mortgage for the same amount on our lands and

timber in Skamania County, Washington, it being understood that both of said One Hundred and Fifty Thousand ($150,000.00) first mortgages shall be paid and released by the payment of said One Hundred and Fifty Thousand Dollars ($150,000.00).

One Hundred and Twenty-five Thousand Dollars ($125,000.00) to be used for the payment of the present floating indebtedness of the Cape Horn Railroad Company.

Two Hundred and Fifteen Thousand Dollars ($215,000.00) to be used for extensions, betterments, and equipment to your railroad property.

Fifty Thousand Dollars ($50,000.00) to be loaned by you to us on our note for that amount dated the 4th day of June, 1910. due on demand with interest from its date at the rate of six (6) per cent per annum. Said loan and interest to be repaid by us by the payment to you (until said loan and interest are paid) of fifty (50) cents on every one thousand (1000) feet, board measure, of logs taken from our timber lands in Skamania County, Washington, after January 1st, 1911, and we agree to take from said lands and ship over your railroad at least sixty million (60,000,000) feet of logs every year, beginning January 1st, 1911, until all the merchantable timber on said lands is exhausted, and upon our failure so to do and to make said payments of fifty (50) cents for every one thousand (1000) feet of logs we agree to at once pay said note and interest or the balance due or to become due thereon in cash. Said payments to be made on or before the 10th day of each month for all logs taken during the previous month.

As a further consideration for the sale to us of said One Million Dollars ($1,000,000.00) par value of your bonds, and without any new or further consideration, we agree to sell and deliver to you Four Hundred Thousand Dollars ($400,000.00) par value six (6) per cent

gold bonds issued by us dated the 4th day of June, 1910, due serially Thirty Thousand Dollars ($30,000.00) par value every six (6) months, beginning May 1st, 1922, the last $40,000 thereof maturing May 1st, 1928, and secured by second mortgage on our lands and timber in Skamania County, Washington, and secured also by Four Hundred Thousand Dollars ($400,000.00) par value of the One Million Dollars ($1,000,000.00) par value of bonds now proposed to be purchased by us from you; said Four Hundred Thousand Dollars ($400,000.-00) par value of our bonds so sold to you, however, or the proceeds of the sale thereof to be used by you only for future extensions, betterments, or equipment to your railroad, after the expenditure of the said sum of Five Hundred and Forty Thousand Dollars ($540,000.00) above mentioned.

The One Million Dollars ($1,000,000.00) par value of your bonds hereby proposed to be purchased by us are all to be executed and delivered by you to the trustee in the mortgage securing the same, and to be by said trustee duly authenticated, and Six Hundred Thousand Dollars ($600,000.00) par value thereof to be deposited with the Mississippi Valley Trust Company of St. Louis, Missouri, to be by it held in trust as security under the terms of a certain first mortgage dated June 4th, 1910, executed by us to said Mississippi Valley Trust Company to secure an issue of Six Hundred Thousand Dollars ($600,000.00) par value six (6) per cent gold bonds issued by us, and the remaining Four Hundred Thousand Dollars ($400,000.00) par value of your bonds hereby proposed to be purchased are to be deposited with the said Mississippi Valley Trust Company to be by it held in trust as security under the terms of a certain second mortgage dated June 4th, 1910, executed by us to said Trust Company to secure an issue of Four Hundred Thousand Dollars ($400,000.00)

par value second mortgage six (6) per cent gold bonds issued by us, which latter Four Hundred Thousand Dollars ($400,000.00) par value second mortgage bonds are the bonds hereinafter agreed to be sold and delivered to you.

The said sum of Five Hundred and Forty Thousand Dollars ($540,000.00) to be deposited as needed for the purposes mentioned above to your credit at said Mississippi Valley Trust Company, and to be paid out on checks signed by you and countersigned by said Trust Company for said purposes.

Your agreement to the above proposition to be indicated by your written acceptance indorsed hereon.

Yours truly,

Oregon Washington Timber Company,

By J. E. Blazier, President.

Accepted: June 4th, 1910.

Washington Northern Railroad Company,

By J. E. Blazier, President."

The testimony shows that the above contract was carried out, that the Timber Company became the owner of the entire bond issue of the Railroad Company, that bonds 1 to 600, inclusive, of the Railroad Company's issue were deposited with the Mississippi Valley Trust Company as collateral security for the first mortgage bonds of the Timber Company, and that bonds 601 to 1000, inclusive, of the Railroad Company's issue were pledged as collateral security for the payment of the second mortgage bonds of the Timber Company and that they came back into the hands of the Washington Northern Railroad Company under the contract aforesaid as collateral security for the second mortgage bonds of the Timber Company which the Railroad Company ac-

quired under the contract of June 4th, 1910, which is in evidence as Complainants' Exhibit "13".

Subsequent to the 4th day of June, 1910, the parties in control of the Railroad Company and the Timber Company organized the Blazier Company, which acquired some additional timber lands in the territory traversed by the Washington Northern Railroad Company's lines. On the 1st of March, 1912, a mortgage in the sum of $425,000.00 was given to appellant by the Railroad Company, the Timber Company, and the Blazier Company. Appellant's security included a first lien on the properties of the Blazier Company, a second lien on the properties of the Timber Company, and, as found by the lower court, and as we contend, a second lien on the properties of the Railroad Company. We think it will not be contended that appellant was an innocent purchaser of the rights which he acquired as against the Timber Company and the Railroad Company. His mortgage, which is in evidence as Complainants' Exhibit "11", expressly recites on page 23 that the property of the Timber Company is subject to the lien of the first and second mortgages executed on the 4th of June, 1910. Appellant's mortgage, on page 17, expressly recites that the property of the Railroad Company is subject to the lien of the mortgage given by the Railroad Company on the 4th of June, 1910. Appellant never acquired manual possession of any of the bonds of the Railroad Company. They have remained at all times on deposit with the Mississippi Valley Trust Company (Vierling, record 274). Although appellant's mortgage was for $425,000.00, the testimony shows that the loan made by

him was in fact only $300,000.00 (Complainants' Exhibit "30").

Thirty thousand dollars has been paid on the Timber Company's mortgage to the Mississippi Valley Trust Company and $30,000.00 has been paid on the principal of the mortgage given to appellant. The remainder of both mortgage debts is now unpaid. Interest is due from May 1st, 1912, on the mortgages given on the 4th of June, 1910, held by appellees and interest is due from September 1st, 1912, on the mortgage held by appellant.

It was provided in the mortgage given by the Railroad Company to the Mississippi Valley Trust Company that when the bonds secured by this mortgage should be paid they should either be cancelled, or at the option of the Railroad Company surrendered to the Railroad Company uncancelled. When $30,000.000 was paid on the first mortgage of the Timber Company to the Mississippi Valley Trust Company bonds to the amount of $30,000.00, secured by the first mortgage of the Timber Company were cancelled and returned to the Timber Company, and at the request of the Railroad Company bonds in a like amount were surrendered to it uncancelled. The mortgage given by the Railroad Company to appellant provides on pages 18 and 19 in part as follows:

"Now, therefore, for the consideration aforesaid, and as a part of the security furnished by the Railroad Company for the payment of the principal of and interest on the notes issued hereunder and secured hereby, the Railroad Company does hereby further sell, assign, pledge, transfer and set over to the Trustee (a) said $400,000

second mortgage bonds of the Timber Company; (b) the said $1,000,000 first mortgage bonds of the Railroad Company *as they are from time to time released and delivered, or releasable and deliverable, by the said Mississippi Valley Trust Company under the terms and provisions of the said first and second mortgage deeds of trust, respectively, of the Timber Company.*"

Appellant's mortgage also provides on page 24 as follows:

"Now, therefore, for the consideration aforesaid and as a part of the security furnished by the Timber Company for the payment of the principal of and interest on the notes issued hereunder and secured hereby, the Timber Company does hereby further sell, assign, pledge, transfer and set over to the Trustee all of its right, title and interest in, to and under its aforesaid $400,000 second mortgage bonds, and also said bonds of the Railroad Company *as they are from time to time released and delivered, or releasable and deliverable, under the terms and provisions of the said first and second mortgage deeds of trust, respectively, of the Timber Company.*"

(Complainants' Exhibit 11.)

Appellant contends that under the foregoing transfer and pledge appellant is the owner of bonds of the Railroad Company to the amount of $430,000.00 and entitled to participate with appellees in the mortgage security in the proportion which $430,000.00 bears to $570,000.00. It is the contention of appellees, and the lower court so found, that appellant is not entitled to participate in the Railroad security until the bonds held by appellees are paid in full.

It is also the contention of appellees that under the after-acquired property clause contained in the mortgage given by the Railroad Company to the Mississippi Valley Trust Company, the bonds of the Railroad Company numbered 601 to 1000, inclusive, became a part of the security of appellees for their debt amounting to $600,000.00 when the Washington Northern Railroad Company became the owner of these bonds as collateral security for the second mortgage bonds of the Oregon-Washington Timber Company pursuant to the provisions of Complainants' Exhibit "13". The lower court also ruled with appellees on this branch of their contention. As we understand it the appeal is taken in the case at bar chiefly for the purpose of reviewing these two contentions.

The remaining questions relied upon by appellant are those arising on his review of the action of the lower court in striking out certain portions of appellant's answer and cross-bill. The matter so stricken out by the lower court undertook to bring in new parties to the suit, charging that they were the owners of at least $300,000.00 in amount of the bonds represented by appellees. It was charged by appellant that the moneys arising from the bond issue of June 4th, 1910, had been diverted from the purposes prescribed in Complainants' Exhibit "13", quoted above, and expended for purposes which were beyond the corporate functions of the Washington Northern Railroad Company. It was charged that these owners of our bonds were parties to such diversion and that the facts constituted an equitable payment of a part of the debt which we represent. All of

the matters and things complained of took place prior to the time when appellant advanced his money and became the owner of a lien on the property. They furthermore did not amount to an allegation of payment, but at most constituted a counter-claim which might have been asserted by one of the mortgagor corporations at its election.

The only remaining issue in the case as tried in the court below had to do with some logging equipment purchased on a conditional contract of sale by the Washington Northern Railroad Company from the Weist Logging Company. The purchase price of this property was $80,000.00; $30,000.00 of this sum was paid from the funds of the Washington Northern Railroad Company, and the remaining $50,000.00 was paid from the funds of the Blazier Company secured on appellant's mortgage. The lower court held that the logging equipment was to be deemed the property of the Blazier Company free from the lien of appellee's Railroad mortgage and subject to the lien of appellant's mortgage. We have taken no appeal from this part of the decree of the lower court and it is our understanding that this branch of the controversy is not before the court.

POINTS AND AUTHORITIES.

I.

Where bonds or notes secured by a lien on real estate come into the hands of the debtor uncancelled, they cannot be reissued so as to rank with other bonds or notes

executed at the same time, secured by the same lien and still outstanding.

New York Security Co. v. Equitable Co., 77 Fed. 64.

Dooley v. Virginia Co., 7 Fed. Cases 913, Case No. 3999.

In Re Burton, 29 Fed. 637, 638, 640.
White v. Fisher, 62 Ill. 258, 259, 261.
Gordon v. Wansey, 21 Cal. 77, 79.
Schinkel v. Hanewinkel, 19 La. Ann. 260.
Thompson's Adm'r v. George, 5 S. W. 760.
Eastman v. Plumer, 32 N. H. 238.
Wallace v. Bank, 1 Ala. 565, 570.
Winans v. Wilkie, 41 Mich. 264; 1 N. W. 1049.
Brosseau v. Lowy, 70 N. E. 901, 904.
Lawson v. McKenzie, 44 Ia. 663.
Swem v. Newell, 19 Colo. 397; 35 Pac. 734, 735.
Kneeland v. Miles, 24 S. W. 1113, 1115 (Tex. App.)

First National Bank v. Maxfield, 83 Maine 576; 22 Atl. 479, 480.

First National Bank v. Harris, 7 Wash. 139, 142-144; 34 Pac. 466.

II.

A party whose mortgage lien is expressly made subject to a prior lien is estopped to dispute the validity of such prior lien or to question its priority.

Bronson v. La Crosse Railroad Co., 2 Wallace 283, 310.

Jerome v. McCarter, 94 U. S. 734, 736.
Central Bank v. Hazzard, 30 Fed. 484, 486.
Pratt v. Nixon, 91 Ala. 192; 8 Southern 751.
Horton v. Davis, 26 N. Y. 495.
Freeman v. Auld, 44 N. Y. 50.
Johnson v. Thompson, 129 Mass. 398, 400.

III.

It is competent for the parties to a mortgage to stipulate that after-acquired property of the mortgagor shall be subject to its lien.

Bear Lake Co. v. Garland, 164 U. S. 1, 15.

A covenant in a mortgage subjecting after-acquired property to its lien is to be interpreted like any other contract to the end that the court may declare and enforce the agreement which the parties have made.

Hickson Co. v. Gay Co., 150 N. C. 316; 63 S. E. 1045.

Parker v. New Orleans Co., 33 Fed. 693.

In Re Medina Quarry Co., 179 Fed. 929, 935-936.

Brady v. Johnson, 75 Md. 445; 26 Atl. 49, 52.

IV.

No one can be an innocent purchaser of negotiable paper under the law merchant unless he has it in his possession.

4 Am. & Eng. 2nd Ed. 310.
Muller v. Pondir, 55 N. Y. 325.

V.

The owner of a cross-demand has an election to aver it by way of set-off and counter-claim or not as he sees fit. He cannot be required to exercise such election at the instance of a second lienor.

Gillespie v. Torrance, 25 N. Y. 306, 311.
McGraw v. Pettibone, 10 Mich. 530, 537.
34 Cyc. 758.

VI.

A creditor cannot attack a corporate transaction on the ground that it is ultra vires.

Force v. Age-Herald Co., 136 Ala. 271; 33 South. 866, 868.

Especially is this true of a creditor whose rights attach subsequent to the transaction complained of.

Allis v. Jones, 45 Fed. 148, 150.
Old Dominion Co. v. Lewisohn, 210 U. S. 206.

VII.

Under the 30th Equity Rule a counter-claim cognizable at law cannot be set up in answer to a bill in equity.

Williams Co. v. Kinsey Co., 205 Fed. 375, 376.

APPELLANT'S LIEN SECOND AND SUBSEQUENT.

The principal question raised by the appeal in this case has to do with the relative rank of appellant's lien.

It is conceded that as to the properties of the Timber Company appellant's lien is subsequent to that which we represent. The third paragraph of the affirmative answer of the appellant, found in the record on pages 69 to 72, recites a stipulation contained in appellant's mortgage to the effect that the properties of the Timber Company pledged to appellant under his mortgage of March 1st, 1912, are subject to the lien of two mortgages executed on the 4th of June, 1910, by the Timber Company. While the priority of these mortgages is expressly conceded appellant contends that as to the Railroad security he is entitled to participate with appellees in the proportions and to the extent pointed out in our statement of facts.

APPELLANT POSTPONED AS TO RAILROAD SECURITY.

We think it is equally clear that appellant is postponed to appellees as to the Railroad security. The answer of appellant, found on page 59 of the record, contains the following admission:

"This defendant admits that said mortgage so executed to the said William W. Crawford, trustee, covered and embraced all of the property described and referred to in the mortgages executed by the Washington Northern Railroad Company and the Oregon-Washington Timber Company to the Mississippi Valley Trust Company under date of June 4th, 1910, and recognizes the priority of the said two mortgages as to the property described in said two mortgages."

The second paragraph of the affirmative answer of appellant, found in the record on page 67, contains the following language:

"That in the mortgage of March 1st, 1912, executed by the said several companies to this defendant Crawford, there is contained, among other provisions, the following:

" 'It is understood and hereby expressly declared: That the property of the Railroad Company is now subject to the lien of that certain mortgage deed of trust dated June 4, A. D. 1910, executed by the Railroad Company to the Mississippi Valley Trust Company, Trustee (a Missouri corporation having its principal office and place of business in the City of St. Louis in the State of Missouri), and recorded in the office of the County Auditor of Skamania County, Washington, in Book "I" of Mortgages on pages 339 to 356, both inclusive, in order to secure the payment of the principal sum of and interest on that certain issue of first mortgage six per cent gold bonds of the Railroad Company, being 1000 bonds, numbered from 1 to 1000, both inclusive, and of the denomination of $1000 each, dated as of June 4, A. D. 1910, and due May 1, A. D. 1928.' "

We believe the law to be well settled to the effect that where a party takes a mortgage expressly subsequent to the lien of a prior and subsisting mortgage he is estopped from disputing the validity and the priority of such existing mortgage.

Bronson v. La Crosse Railroad Co., 2 Wallace 283, 310.

This was a mortgage foreclosure. A third mortgagee sought to attack the validity and resist the enforcement of prior mortgages, although his own mortgage was taken subject to the prior mortgages. The court

held that his defense was untenable. Speaking through Mr. Justice Nelson the court said:

"We now come to a branch of the case which presents a more conclusive answer to all the charges, whether in allegations or in proofs of the respondents, and overrides all other views that may or can be taken of them.

"As we have seen, this third mortgage, under which the Milwaukie and Minnesota Company was formed, was executed and delivered to Barnes, the trustee, on the 22d June, 1858, to secure the payment of an issue of $2,000,000 in bonds, and a supplement to this mortgage was executed to the same trustee, on the 11th August following.

"These two mortgages, or rather one in two parts, were, in express terms, made subject, among other incumbrances mentioned, to the bonds secured by a second mortgage on the Eastern Division of the road, to the amount of one million of dollars.

"Again, the bonds issued under this third mortgage, one of which is in the proofs, have an indorsement on the back, as follows: 'State of Wisconsin, La Crosse and Milwaukee Railroad Company, third mortgage sinking fund bond, seven per cent., etc.;' subject, among other things, 'to a second mortgage on the same line of road of $1,000,000.'

"At the time this third mortgage was executed, and thus made subject to the second mortgage bonds, all these bonds had been negotiated by the company, and were in circulation in the business community. They were all negotiated in the months of September, October, November, and December, 1857. This, the company, of course, well knew at the time of the execution

of the third mortgage, and knew, also, of the circumstances attending the negotiation of them. They had received and were in the enjoyment of the avails of them, and with this knowledge, and under these circumstances, the third mortgage, and the bonds issued under it, were made in express terms subject to the payment and satisfaction of the bonds issued under the second. All persons, therefore, taking these third mortgage bonds, or coming in under the mortgage, took them and came in with a full knowledge that the mortgagor had made the security subject to the prior lien and indebtedness. Even if there had been any valid objection to these bonds under the second mortgage, it was competent for the obligor to waive them, and no better proof could be furnished of the waiver, than the acknowledgment of the full indebtedness, by making the subsequent security subject to it. This was a question that belonged to the obligor to determine for himself when giving the third mortgage; but, besides this, what right have those coming in under it to complain? They come in with full notice of the acknowledgment of the indebtedness and previous lien."

Jerome v. McCarter, 94 U. S. 734, 736.

This also was a foreclosure suit and a junior mortgagee undertook to resist the foreclosure of the prior mortgage. The court, speaking through Mr. Justice Strong, said:

"The company is estopped by the provisions of its mortgage, of which the complainant is trustee, from asserting that the entire amount of the two $500,000 mortgages, and of the receiver's mortgage, was not outstanding when the present mortgage was made. The full indebtedness was acknowledged by making the junior

mortgage expressly subject to it, and as there is no evidence that any portion of it has been paid, it is not admissible for the mortgagors or their assignees in bankruptcy to deny it now."

In further support of the principle announced in these authorities, see

Central Bank v. Hazzard, 30 Fed. 484, 486.
Pratt v. Nixon, 91 Ala. 192; 8 Southern 751.
Horton v. Davis, 26 N. Y. 495.
Freeman v. Auld, 44 N. Y. 50.
Johnson v. Thompson, 129 Mass. 398, 400.

We do not understand that appellant disputes the force and effect of the foregoing authorities. The principle announced by them is too well established to be disputed by any good lawyer. As we understand the position of appellant, his contention is that he is the owner of Railroad bonds to the amount of $430,000.00, and that he is therefore protected by the lien of the Railroad mortgage to the same extent as appellees.

APPELLANT NOT OWNER OF RAILROAD BONDS.

Appellant's rights with reference to the Railroad bonds are no other than those created by his mortgage of March 1st, 1912, which is in evidence as Complainants' Exhibit "11." Manifestly appellant could acquire no rights under that mortgage except such as the mortgagors were able to grant on the date which the mortgage bears. They did not in fact undertake to grant and assign to appellant the $430,000.00 of Railroad bonds which appellant now claims to own. The parties

without doubt understood on the 1st of March, 1912, that the lien asserted by appellees in this suit was a first and prior lien on the properties and that all of the bonds of the Railroad Company were pledged to secure the debt of appellees. We can place no other construction on the language contained in appellant's mortgage. The property transferred by the Railroad Company to appellant in and by Complainants' Exhibit "11" is listed in eight different specifications. The first seven of these specifications are unimportant for present purposes. The eighth specification, found on pages 17 to 19 of Complainants' Exhibit "11", contains the recital with reference to the priority of the mortgage of June 4th, 1910, quoted by appellant in his answer, found at page 67 of the record and heretofore set forth in this brief. It then recites that six hundred of the bonds secured by the Railroad mortgage, being bonds from 1 to 600, inclusive, were pledged as collateral security for the payment of the first mortgage bonds of the Timber Company. It then contains the following recital, found on page 18 of the Crawford mortgage:

"That 400 of the aforesaid bonds of the Railroad Company, being bonds numbered 601 to 1000, both inclusive, have been pledged or assigned as collateral security for that certain issue of second mortgage six per cent bonds of the Timber Company, aggregating the principal sum of $400,000, issued under and secured by a second mortgage deed of trust executed by the Timber Company to the said Mississippi Valley Trust Company, Trustee, under date of June 4, A. D. 1910; which said 400 bonds of the Railroad Company now held by the said Mississippi Valley Trust Company as collateral se-

curity as aforesaid, are by the terms of the said second mortgage deed of trust of the Timber Company, required to be delivered uncancelled to the Railroad Company upon its demand from time to time, in like amounts and in the order of their corresponding numbers, as the said second mortgage bonds of the Timber Company are paid;"

The mortgage then recites that the Railroad Company is the owner of the second mortgage bonds of the Timber Company and entitled to pledge the same. We quote the portion of the mortgage immediately following:

"That the Railroad Company is duly authorized and empowered to issue, use, negotiate, pledge or assign, for its corporate purposes, its said bonds as they are surrendered and delivered to it as aforesaid.

"Now, therefore, for the consideration aforesaid, and as a part of the security furnished by the Railroad Company for the payment of the principal of and interest on the notes issued hereunder and secured hereby, the Railroad Company does hereby further sell, assign, pledge, transfer and set over to the Trustee (a) said $400,000 second mortgage bonds of the Timber Company; (b) the said $1,000,000 first mortgage bonds of the Railroad Company *as they are from time to time released and delivered, or releasable and deliverable, by the said Mississippi Valley Trust Company under the terms and provisions of the said first and second mortgage deeds of trust, respectively, of the Timber Company.*"

The foregoing language is too clear to admit of construction. It was provided in the Railroad Company's

mortgage to the Mississippi Valley Trust Company that when the bonds were paid they should either be cancelled, or at the option of the Railroad Company be delivered to the Railroad Company uncancelled. The stipulation exacted by appellant was that when the bonds were paid and when they were delivered uncancelled to the Railroad Company, or when the Railroad Company was entitled to have them delivered uncancelled, then and not until then, should they become a part of the security of appellant. The court will notice that the pledge covered not $400,000.00 in amount of bonds, but the entire issue of One Million Dollars. Appellant had no more right to bonds 601 to 1000, inclusive, than he had to bonds 1 to 600, inclusive. His right in each case was to receive the bonds after they had been paid and when the mortgagor became entitled to them either cancelled or uncancelled at its option.

The property pledged and mortgaged by the Timber Company to appellant is set forth in six paragraphs found on pages 19 to 24, inclusive, of the Crawford mortgage. The sixth paragraph is the one with which we are concerned in this case. It recites that the property of the Timber Company is subject to a first and a second mortgage both executed on the 4th of June, 1910, in favor of Mississippi Valley Trust Company. It contains a recital at the close of the twenty-third and at the top of the twenty-fourth page of Complainants' Exhibit "11" as follows:

"and by and under which mortgage deed of trust the first mortgage bonds of the Railroad Company to the

aggregate amount of $400,000 face value (being bonds numbered 601-1000) have been pledged or assigned to the said Mississippi Valley Trust Company, Trustee, as further and collateral security for said second mortgage bonds of the Timber Company, but which said bonds of the Railroad Company are to be surrendered to it from time to time as the said second mortgage bonds of the Timber Company are paid, as hereinabove more fully stated."

The granting words from the Timber Company contained in the Crawford mortgage found on page 24 are as follows:

"Now, therefore, for the consideration aforesaid and as a part of the security furnished by the Timber Company for the payment of the principal of and interest on the notes issued hereunder and secured hereby, the Timber Company does hereby further sell, assign, pledge, transfer and set over to the Trustee all of its right, title and interest in, to and under its aforesaid $400,000 second mortgage bonds, and also said bonds of the Railroad Company *as they are from time to time released and delivered, or releasable and deliverable, under the terms and provisions of the said first and second mortgage deeds of trust, respectively, of the Timber Company.*"

The question of law arising on these facts is whether it is competent for a mortgagor to reissue bonds or notes secured by mortgage which have come into his hands uncancelled on payment thereof so as to permit them to rank with other bonds or notes secured by the same mortgage still outstanding in the hands of innocent purchasers. We contend that a mortgagor has no such right; that if such bonds or notes can be reissued at all

they are subsequent in rank and dignity to the original issue which has not been paid. If the rule were otherwise the security of a mortgagee would grow worse instead of better on the partial payment of the debt.

We have found no dissent in the authorities on this question. So far as our examination has gone they are unanimous to the effect that bonds or notes secured by a mortgage which have come into the hands of the mortgagor uncancelled cannot be reissued so as to rank with the original issue of bonds or notes in the matter of security under the mortgage.

New York Security Co. v. Equitable Co., 77 Fed. 64.

This is a decision passed by Circuit Judge Lacombe in the Southern District of New York. The syllabus is as follows:

"1. Mortgage Bonds-Sale of Security-Corporations.

A corporation mortgagor, coming into possession of bonds or coupons secured by its mortgage, cannot enforce them against the proceeds of sale of the mortgaged property, where such proceeds are insufficient to pay in full the other outstanding bonds and coupons secured thereby.

2. Same-Assignment-Reissue.

If a corporation mortgagor regains possession of past-due obligations, freed from any lien, and assigns without delivering them, such assignment does not constitute a reissue, and the assignee gets only the right, title and interest of the mortgagor."

Dooley v. Virginia Co., 7 Fed. Cases 913, Case No. 3999.

Asa Snyder executed five promissory notes secured by a deed of trust on some real estate in the city of Richmond. As the first three notes matured he secured the money to take them up from the defendant, and as the notes came into his possession they were delivered by him to the defendant. The defendant purchased the fourth note and the fifth note remained at the time of the litigation in the hands of the original payee, Dunlop, Moncure & Co. The register in bankruptcy held the defendant entitled to participate in the security on the basis of the first three notes which had been taken up by the maker and reissued by him to the defendant. On exceptions to the register's report the court said:

"The three negotiable notes which are the subject-matter of this controversy were due from Snyder to Dunlop, Moncure & Co. They were never indorsed to a third person by the payees. They remained to the date of their maturity evidences of indebtedness from Snyder to Dunlop, Moncure & Co., the payees named in them. They could become evidences of indebtedness from Snyder to a third person only by the payees' indorsement of them before maturity, or their assignment of them after maturity. They were not indorsed over by Dunlop, Moncure & Co. They were placed in bank by them for collection on their own account. They were so collected by the bank on account of Dunlop, Moncure & Co. As to Dunlop, Moncure & Co., they were paid. As to the payees holding the notes at maturity they were paid. The checks which were used for paying them were presented by Snyder; and the notes were delivered to Snyder on payment. As to the only persons having the property in the notes at the time of their maturity, the notes were paid. If they, as notes, were paid to the

only persons having a right to demand payment when they became payable, they were paid as to all the world. When received from the bank to Snyder they ceased to be notes due according to their tenor. They ceased to be obligations to any one according to their tenor. They ceased to be the property of the only persons who could own them, as obligations of Snyder according to their tenor; and they became the property of Snyder, not as his notes due according to their tenor and purport, but only as vouchers or evidence of a past transaction and an extinguished debt."

The defendant was therefore postponed as to the first three notes, and the security was held first applicable to the payment of the fourth and fifth notes, which had never come into the hands of the maker.

In Re Burton, 29 Fed. 637, 638, 640.

Here the District Court for the Western District for Virginia, speaking through Judge Paul, said:

"The question thus presented for decision, viz., can a bankrupt purchase and take an assignment to himself of lien debts against his estate in bankruptcy, and collect the same for his own use, out of assets in the hands of his assignee in bankruptcy, to the exclusion of subsequent lienholders is one, so far as the court is informed, that has not been judicially settled. The court, therefore, is left in its determination to the guidance of general principles, rather than to the control of established precedents.

"It is conceded that when the characters of debtor and creditor of the same debt become united in the same person the debt is extinguished. Says Pothier (1 Poth. Obl. 607);

" 'It is evident that, by the concurrence of the opposite characters of debtor and creditor in the same person, the two characters are mutually destroyed, for it is impossible to be both at once. A person can neither be his own creditor nor his own debtor. From hence, indirectly, results the extinction of the debt, when there is no other debtor; for as there can be no debt without a debtor, and the confusion having extinguished the character of debtor in the only person in whom it resided, and there being no longer any debtor, there cannot be any debt.'

"The debt not being destroyed by the discharge in bankruptcy, but the obligation to pay it continuing, when the bankrupt recognizing this obligation; voluntarily pays these debts; or compromises them with the holders; he declines to avail himself of the advantage of his discharge; he waives it as a bar to a recovery against him, and does what duty demands, and what the law (failing to plead his discharge) would compel him to do. It is clearly as complete and full satisfaction of the debts as can be made.

"One of the debts claimed in this case by the bankrupt (The Slaughter debt, No. 3) illustrates the remarkable position the bankrupt might occupy, and the gross injustice that might be done if any other rule prevailed than that just laid down by the court. This debt was paid off by an indorser; whether by the first, second, or third indorser is not shown. Suppose it was paid by the second indorser, of course he would have a right to recover of the first indorser the amount paid. But he sells and assigns the debt, of course, with all his rights, to the bankrupt, here the principal debtor. Would there be any justice in allowing this principal debtor to recover of the prior indorser the amount paid by the second in-

dorser in satisfaction of the obligation of the principal debtor? Yet this is exactly what might occur if the position contended for by counsel for the principal debtor here, E. J. Burton, be allowed as law. Again, suppose that one of three sureties had paid off the whole of this debt, he would be entitled to contribution from his two co-sureties. But he assigns his claims to the principal debtor, who purchases it. Will it be pretended that this principal debtor could or ought to be allowed to recover off of his own sureties two-thirds of a debt paid for him by a third surety? The statement of the question must answer it in the negative."

White v. Fisher, 62 Ill. 258, 259, 261.

"In this case the appellants held certain notes, executed by the firm of Fisher, Brother & Co., maturing in one, two and three years from date, each appellant holding different notes, but all secured by one mortgage, which was given by Edward M. Fisher, the senior member of the firm. When the notes, due at the end of the first year, matured, they were taken up by Edward M. Fisher, and at his request the payees, when they surrendered the notes, placed their names on the back."

Edward M. Fisher delivered them to J. M. Fisher, who contended that he was their owner, that the money used to take them up had been his money, and that he was entitled to participate in the security. The court adjudged that he did have the right to so participate but only after the other notes, still outstanding and which had never come into the hands of the principal debtor, were paid. The opinion concludes as follows:

"As the notes, after being taken up were re-issued to J. M. Fisher by the makers, as against them he would be entitled to participate in the proceeds of the mortgage,

but the notes in his hands must be postponed to those falling due at the end of the second and third years."

Gordon v. Wansey, 21 Cal. 77, 79.

Here the court said:

"This is an action upon seven promissory notes of which the plaintiff claims to be the holder by assignment. Six of these notes, payable to different parties, were assigned to one of the makers, and by him to the plaintiff. The first assignment was before and the second after maturity, and the question arises as to the effect of these assignments. * * * We are of the opinion that the transaction amounted to payment, and that the notes became functus officio, and were not revived by the assignment to the plaintiff."

Schinkel v. Hanewinkel, 19 La. Ann. 260.

The syllabus of this case is as follows:

"Where one of a series of notes, secured by mortgage, delivered by the maker, has come again into his hands, the debt evidenced by it is extinguished by confusion."

"By reissuing such note, after maturity, he may bind himself, but cannot revive the obligations of the other parties, nor the mortgage securing it, which being only an accessory to the principal debt between the maker and the payee, is extinguished with the note."

We quote the entire opinion of the court:

"Labanue, J.—On the 4th day of May, 1863, the defendant, Hermann Hanewinkel, executed three promissory notes to his own order, and endorsed by him; one for $5,000, another for $3,000, and a third one for $2,000, and to secure the payment of the same, executed a mortgage on certain city lots. The plaintiff having

become the holder of the first named note for $5,000, and of the third named note for $2,000, obtained an order of seizure and sale, and had the property sold for cash, and the proceeds of sale, amounting to $3,500, were retained by the purchaser after paying costs and charges.

"Plaintiff's counsel took a rule upon Webber, who was the holder of the $3,000 note, to show cause why the whole proceeds of sale should not be applied to the payment of the two notes sued upon, on the ground that the said $3,000 note had been returned to the maker, and was extinguished.

"Webber answered to the rule that the said note had been given to him as a collateral security by one Marchand, to secure the sum of about $1,800, and prayed that the rule be dismissed.

"The testimony shows that this $3,000 note had been in the hands of Edward Schinkel, and handed back by him to the maker, Hanewinkel, who it seems gave it to one Marchand, a note broker, who passed it to George Merz to obtain money for the maker, Hanewinkel, George Merz was paid for the note by Marchand at its maturity. Marchand says:

" 'I became the owner of this note at its maturity on my paying it. Hanewinkel came to me, and upon hearing his troubles, I offered him this note, and Webber got it from him. This occurred a couple of months after the note had been paid by me at maturity.'

"It appears then that this note had come into the hands of the maker, who re-issued it to Webber two months after maturity. Webber acquired, knowingly, an extinguished paper, and the mortgage was also ex-

tinguished, and could not be revived. C. C., Art. 3374, 2214; 4 Rob. 416; Hill v. Hall.

"Rule made absolute; judgment affirmed."

Thompson's Adm'r v. George, 5 S. W. 760.

The syllabus in this case is as follows:

"Plaintiff loaned T. $1,000, taking a note and a mortgage to secure same. This note was paid, and with the mortgage surrendered to T. Soon afterwards plaintiff loaned T. another $1,000. No new note was given, but the old note and mortgage were returned to plaintiff as security for the debt. The debtor died, and plaintiff brought action on the note and to foreclose the mortgage. The true state of facts developing on the trial, plaintiff filed an amended petition showing the whole transaction. Held, that the parol agreement that the mortgage should stand against the land is insufficient to create a lien, but that plaintiff was entitled to judgment against the administrator for the amount due him."

Eastman v. Plumer, 32 N. H. 238.

"Young and the defendant executed a note in favor of J. F. Roby, who indorsed it in blank. Plaintiff furnished Young the money to take it up and Young paid the money to the holder, took the note from him and delivered it to plaintiff. Held that the transaction constituted payment and that Young could not re-issue the note so as to bind defendant."

Wallace v. Bank, 1 Ala. 565, 570.

"If William Wallace (the maker) became the proprietor of the note in the regular course of trade, after it has become a valid security for money in the hands of the payee, it was *ipso facto* extinguished; inasmuch as it would have answered the purpose of its creation, and the

right to receive pertained to, and the obligation to pay was incumbent upon, the maker, and consequently could not have been made available."

Winans v. Wilkie, 41 Mich. 264, 1 N. W. 1049.

In this case it is held that a party who as grantee in a deed had assumed the payment of a mortgage could not take an assignment of the mortgage and then foreclose it. His assumption of the debt made him the principal debtor, and his acquisition of the mortgage extinguished it.

Brosseau v. Lowy, 70 N. E. 901, 904.

This case squarely holds that where a debt is paid by a party legally chargeable with its payment he cannot reissue the evidence of the debt and security therefor in such manner as to preserve the lien. This same principle is decided in

Lawson v. McKenzie, 44 Ia. 663.

Swem v. Newell, 19 Colo. 397, 35 Pac. 734, 735.

Here the court said:

"From the face of the note sued on, and the allegations of the complaint, it appears that Henry Sparnick was a joint maker, and the payment by him to Young, the payee, on the 2d of August, 1883, of the amount of the principal and interest then due, operated as a full satisfaction, and ended the life and existence of the note. It was thenceforth functus officio, and could not be enforced against the other joint makers. Fitch v. Hammer, 17 Colo. 591, 31 Pac. 336; Edgerly v. Emerson, 23 N. H. 555; Sprague v. Ainsworth, 40 Vt. 47; Lenoir v. Rittenhouse, 61 Miss. 400; Adams v. Drake, 11 Cush. 504; 3 Rand. Com. Paper, Sec. 1426. 'Payment by one

of several joint debtors, although it be made by him in the form of a purchase, and be accompanied by an assignment of the debt, is still a discharge of the debt.' Institution v. Hathaway, 134 Mass. 69."

Kneeland v. Miles, 24 S. W. 1113, 1115 (Tex. App.).

Here the Court said:

"When the maker of an instrument has it in his possession the presumption would be that it was paid, and he would not have the power of negotiating it, so as to bind joint promisors. Tied. Com. Paper, Sec. 294. * * * When one of two joint promisors pays off a note, it becomes non-negotiable, and it cannot be reissued so as to bind the other promisor; and it is immaterial whether the reissue was made before or after maturity."

First National Bank v. Maxfield, 83 Maine 576, 22 Atl. 479, 480.

Here the Court said:

"When commercial paper is paid by the party whose debt it appears to be, it becomes functus officio, commercially dead, and no longer retains the character that it originally had. It is then but evidence of the transaction of its commercial life; and the party seeming to be the promisor, who has paid it, may use it as evidence, in connection with other proof, to compel the real debtor to pay it."

The Supreme Court of Washington is in line with the foregoing authorities.

First National Bank v. Harris, 7 Wash. 139, 142 to 144, 34 Pac. 466.

"Appellants moved for a non-suit, on the ground that where a promissory note upon which some of the makers

are sureties only, is found, after negotiation, in the hands of the principal obligor, it is presumed to have been paid; and that if the principal obligor attempts to negotiate that note to a person having knowledge of the suretyship, the person with such knowledge obtains no title to the note as against the sureties; but the motion was denied. Nothing is better settled than the legal proposition here laid down.

"Possession by the maker of a promissory note after it has been in circulation is presumptive evidence of its payment. Hollenberg v. Lane, 47 Ark. 394 (1 S. W. Rep. 687); Turner v. Turner, 79 Cal. 565 (21 Pac. Rep. 959); Stevens v. Hannan, 86 Mich. 305 (48 N. W. Rep. 951; 49 Id. 874); McGee v. Prouty, 9 Metc. (Mass.) 547; Heald v. Davis, 11 Cush. 318; Penn v. Edwards, 50 Ala. 63; Sutphen v. Cushman, 35 Ill. 186; Walker v. Douglas, 70 Ill. 445; 2 Randolph Com. Paper, Sec. 941; Lawson's Pres. Ev., rule 75b.

"And a note coming into the hands of the maker, after payment, cannot be re-issued by him so as to bind a surety. Hopkins v. Farwell, 32 N. H. 425; Eastman v. Plumer, 32 N. H. 238; Lancey v. Clark, 64 N. Y. 209, Cason v. Heath, 86 Ga. 438 (12 S. E. Rep. 678); 2 Brandt, Suretyship, Sec. 333.

"The application of these rules to this case is evident. * * * * *

"The fact that the time allowed by the note for its payment had not expired made no difference in the presumption of payment arising from Harris' and Wheeler's possession of it; it was payable on or before January 1, 1885, so that the principals would have had the right to take it up at any time. In Stevens v. Hannan, supra, the note was of the same kind.

"Therefore, upon the proofs as they stood at the close of plaintiff's case, we think there should have been a nonsuit."

Under the terms of the Crawford mortgage appellant cannot become the owner of any of the railroad bonds until after they have become the property of the Washington Northern Railroad Company. When the bonds come into the hands of the Washington Northern Railroad Company under the foregoing line of authority it is clear that they cannot be reissued so as to rank with the other bonds of the railroad company now outstanding for which value has been given.

No other rule than the rule announced in the foregoing authorities could be workable. A considerable payment on the principal of a mortgage debt will ordinarily exhaust the security in part. If the evidence of debt surrendered when such payment is made can be reissued and rank with the unpaid portion of the same debt the lienable debt remains the same while the security is diminishing, and every part payment on account of principal to that extent alters the position of the first lienor to his disadvantage. Such a situation is not contemplated when money is loaned on mortgage bonds, nor was it contemplated by the parties to the contracts of June 4th, 1910.

AFTER-ACQUIRED PROPERTY.

It appears from Complainants' Exhibit "13," previously quoted in this brief at pages 4 to 7, that Railroad bonds 601 to 1000, inclusive, were transferred by the Railroad Company to the Timber Company and

were thereupon pledged by the Timber Company as collateral security for the payment of the second mortgage bonds of the Timber Company, and that the Timber Company's second mortgage bonds, with the Railroad bonds aforesaid as collateral to them, were thereupon sold and assigned to the Washington Northern Railroad Company. There is no dispute about these facts. Complainants' Exhibit "13" is set out in appellant's answer, pages 76 to 79 of the record. There can be no doubt that the Railroad Company by these transfers became the owner of its bonds numbered 601 to 1000, inclusive. Appellees contend, and the lower court found, that these bonds thereupon fell within the after-acquired property clause contained in the Railroad Company's mortgage to the Mississippi Valley Trust Company and that the Railroad Company could not in any manner pledge them thereafter, except subject and subsequent to the lien for $600,000.00 held and asserted by appellees.

We allege in our amended bill that the Railroad Company in and by its mortgage of June 4th, 1910,

"conveyed and transferred to the Mississippi Valley Trust Company, as trustee, in like manner all of the franchises, contracts, rights of way, easements, privileges, traffic agreements, rolling stock, cars and engines which were then owned by the Washington Northern Railroad Company, or which should be thereafter acquired by it, and also all rents, incomes, tolls and profits accruing or to accrue from the business of the Washington Northern Railroad Company, and particularly from the operation of the said property. There was also transferred and conveyed by the defendant, Washington Northern Railroad Company, to Mississippi Valley Trust Company, in and

by the said mortgage, all future acquired property, whether the same was real, personal or mixed, and it was specifically provided in and by the said instrument of mortgage that the said future acquired property should be deemed to be a part of the security transferred by the said mortgage and deed of trust, and as fully embraced within the provisions thereof and subject to the lien created thereby as if the said future acquired property had been owned by the Washington Northern Railroad Company on the 4th of June, 1910, and had been specifically described and mentioned in the said mortgage and deed of trust."

(Record pages 7 and 8).

These allegations are not denied by appellant, but on the contrary the eighth paragraph of his answer contains the following admission:

"admits that said mortgage contained a provision that all after acquired property by the railroad company should become a part of the security under the said mortgage or deed of trust."

(Record 42.)

The after-acquired property clause of the Railroad Company's mortgage found on page 7 of Complainants' Exhibit "8" is as follows:

"The grant is intended to include and shall include all of the franchises, *contracts* rights of way, easements, privileges, traffic agreements, rolling stock, cars and engines *now owned by said Company or which may hereafter be acquired by it;* and also all rents, incomes, tolls and profits accruing and to accrue from its said business.

"It is the intention of these presents and it is hereby agreed, that all future acquired property, real or per-

sonal or mixed, including all future extensions, improvements or betterments of the property hereafter acquired by said Company, *shall be as fully embraced within the provisions hereof, and subject to the lien hereby created* for securing payment of all of said bonds, together with interest thereon, *as if the said property were now owned by said Company and were specifically mentioned herein.*

"Also all real property, timber and timber rights, and rolling stock of the Railroad Company of every kind and description now owned or hereafter acquired and wherever situate, and all lands, tenements, hereditaments, buildings, structures, warehouses, workshops, mills, plants and fixtures; all machinery, engines and boilers, all documents, deeds, timber contracts and leases, maps, surveys, inventories and papers relating to the real estate and timber rights and contracts conveyed hereby, now owned or hereafter acquired; and all rents, issues, and profits, earnings, and income from the property hereby conveyed; *it being the intention hereby to convey, and said Railroad Company does hereby convey, transfer and assign, all property of the above kind, nature and description, which it now owns and all which it may hereafter own or acquire in any manner.*"

The language italicized above very plainly comprehends the $400,000.00 of railroad bonds which are in issue as between the appellant and complainants. They were certainly contracts and future acquired property. We do not know how it would be possible to frame a more comprehensive after acquired property clause than that above set forth. It covers "all future acquired property, real or personal or mixed." The contention of appellant is that regardless of the language contained in an after acquired property clause if the mortgagor be a

railroad company nothing will be embraced within the after acquired property clause except property appurtenant to the railroad and useful to the mortgagor in the operation of its railway line. Three authorities have been cited in support of this proposition. The first of them is

Moran v. Pittsburgh Co., 32 Fed. 878, 886.

In this case the mortgagor railroad company had executed a lease of its line to a lessee of financial responsibility. One of the provisions of the lease required the lessee to pay interest on the bonds secured by a mortgage which covered the railroad. On the foreclosure of this mortgage the court held that this covenant in the lease did not pass to the foreclosure purchaser under the after acquired property clause because the debt evidenced by the bonds was extinguished by the foreclosure and no longer bore interest and also because the foreclosure operated as an eviction of the lessee. We have carefully read this case and have been unable to find anything in the case, as reported, which supports the legal proposition relied on by appellant.

One of the other cases is

Mallory v. Maryland Glass Co., 131 Fed. 111.

This was a case in which the mortgage covered a stock of merchandise changing from time to time and an attempt was made to cover after acquired personal property purchased in keeping up the stock and substituted for the merchandise in the store at the time when the mortgage was executed. The Federal Court sitting in Maryland cited a line of Maryland authorities to the

effect that this character of mortgage was void under the Maryland law and the Federal Court followed these Maryland authorities. The Maryland cases are in line with some Oregon cases which hold that the placing of a stock of merchandise on sale is a waiver of the lien of the mortgage covering the merchandise.

Aiken v. Pascall, 19 Ore. 493.
Orton v. Orton, 7 Ore. 479.

The above case in 131 Federal cited on behalf of appellant, as we read it, turns on a question of law in no wise material to the present controversy.

The third case, and the one on which appellant chiefly relies, is

Mississippi Company v. Chicago Company, 58 Miss. 902.

As we read this decision it does not hold that the after acquired property clause in a railway mortgage will be confined by operation of law to property useful in the operation of a railroad. It does hold that general words in an after acquired property clause covering all property which the mortgagor may thereafter acquire are void for uncertainty. We think the Mississippi case stands alone in American case law on this subject.

It has been determined by the Federal Supreme Court many times that an after acquired property clause will be enforced and that such a clause covers all property embraced within the general terms used.

Bear Lake Company v. Garland, 164 U. S. 1, 15.

In the nature of things it is not possible to describe after acquired property with the same particularity as property in existence at the time when the mortgage is written. An examination of the authorities will show the court that the after acquired property clause in a mortgage is interpreted by the courts like all other contracts and that property acquired by the mortgagor subsequent to the mortgage properly falling within the description contained in the after acquired property clause becomes immediately subject to the mortgage lien.

Hickson Company v. Gay Company, 150 N. C. 316; 63 S. E. 1045.

In this case the after acquired property clause was as follows:

"Also all the property, real, personal, or mixed, wheresoever the same is situated, now owned by the Gay Lumber Company, or shall be owned during the continuance of the liability hereinafter mentioned."

The question was raised as to whether the mortgage covered property purchased by the mortgagor subsequent to the date of the mortgage with money of the mortgagor, borrowed from a second mortgagor who contested the validity of the after acquired property clause. The court held that this property was subject to the mortgage, using the following language:

"The concensus of authority leads us to conclude that the terms employed in the Pou mortgage are sufficient to embrace the after-acquired lands and personal property of the mortgagor.

"The words being sufficient, we will next consider the validity of such a mortgage. It is well understood

that at common law nothing can be mortgaged that is not in existence and does not at the time belong to the mortgagor, for a person cannot convey that which he does not own; but it is now well settled that equity will give effect to a contract to convey future-acquired property, whether real or personal. Equity considers that done which the mortgagor has agreed to do, and treats the mortgage as already attaching to the newly acquired property as it comes into the mortgagor's hands. 'It is settled that such a clause is valid,' says Mr. Justice Brewer in Trust Co. v. Kneeland, 138 U. S. 419, 11 Sup. Ct. 358, 34 L. Ed. 1014. 'A clause in a mortgage which subjects subsequently acquired property to the lien of the mortgage is a valid clause,' says Mr. Justice Peckham, in Bear Lake Co. vs. Garland, 164 U. S. 15, 17 Sup. Ct. 10, 41 L. Ed. 327."

Parker v. New Orleans Co., 33 Fed. 693.

The after acquired property clause involved in the above case was much narrower than the one with which we are concerned. It read as follows: (See page 695.)

"Also all other property, real and personal, of every description and kind whatsoever, and wheresoever situated in the state of Louisiana, which is now owned, or shall be hereafter acquired, by said company, and which shall be appurtenant to, or necessary for the operation of, said main line of railroad, or any of said branches. Also all the tenements, hereditaments, and appurtenances thereunto belonging, and all of the estate, right, title, and interest, legal and equitable, of the said company and its successors and assign therein, together with the corporate franchises and privileges of said company, at any time granted, or to be granted, by the state of Louisiana relative to the construction, operation, or use of said railroad within said state."

Under this language the Federal Court for the Western District of Louisiana held subject to the mortgage lien a land grant in no wise connected with the operation of the railway.

In re Medina Quarry Company, 179 Fed. 929, 935-936.

Under general language contained in an after acquired property clause the court in the above case held subject to the mortgage two pieces of real estate in no wise connected with the quarry business and also certain profits earned by the mortgagor company in a business conducted by it in violation of law.

In line with the foregoing authorities see

Brady v. Johnson, 75 Md. 445; 26 Atl. 49, 52.

All of the foregoing authorities sustain our contention that the question of what is included in the after acquired property clause of a mortgage is dependent upon the language used and that where the language is clear and comprehensive it will be given effect according to its usual meaning.

If such be the rule of law we cannot see any escape from the conclusion found by the lower court that the Railroad Company's bonds numbered 601 to 1000, inclusive, became a part of our security when they were reassigned to the Railroad Company as collateral for the second mortgage bonds of the Timber Company.

Complainants' Exhibit "13", being the contract entered into between the Railroad Company and the Timber Company under date of June 4th, 1910, expressly

provided that the second mortgage bonds, with their collateral, were "to be used only for future extensions, betterments, or equipment" for the railroad. This contract is incorporated in the records of the Oregon-Washington Timber Company, Complainants' Exhibit "33", and the testimony shows without contradiction (Collins 264) that the record book of the Oregon-Washington Timber Company was in the possession of Messrs. Zane, Busby & Weber, attorneys who represented appellant at the time when his loan was made to the Timber Company and to the Railroad Company. There is in evidence as Complainants' Exhibit "29", a letter from Zane, Busby & Weber, of date March 26th, 1912, returning these record books to J. E. Blazier. The testimony of Mr. Collins is to the effect that the record book in question was in the possession of these gentlemen for a month prior to March 26th, 1912, and the testimony also shows that although appellant's mortgage bears date of March 1st, 1912, the moneys arising under it were not disbursed until the month of April, 1912.

It is therefore apparent that appellant took his mortgage with notice of the agreement entered into between the two mortgagor corporations to the effect that the second mortgage bonds of the Timber Company and the Railroad bonds in the sum of $400,000.00, pledged as collateral to them, were to be used only for the purpose of betterments and extensions of the Washington Northern Railroad Company. Appellant is also of course chargeable with notice of the after-acquired property clause contained in the mortgage of the Railroad Com-

pany to the Mississippi Valley Trust Company under which we claim.

Under the pleadings we are entitled to rely upon these facts. We allege in our amended bill (record 34-35) as follows:

"That it was provided in and by the agreement between Washington Northern Railroad Company and Oregon-Washington Timber Company that the second mortgage bonds of Oregon-Washington Timber Company with the collateral therefor, to-wit, bonds six hundred and one (601) to one thousand (1000) of the first mortgage bond issue of Washington Northern Railroad Company, should be sold and the proceeds thereof should be applied to the construction of additional railway lines for the Washington Northern Railroad Company into timber owned by Oregon-Washington Timber Company, and for the making of betterments and the purchase of equipment for said railroad. That your orators are advised that the said bond issue was not used for these purposes, but that the said bonds were undertaken to be pledged by the defendants, Oregon-Washington Timber Company and Washington Northern Railroad Company to the defendant, William W. Crawford, trustee, as hereinbefore set forth."

Appellant in his answer does not deny these allegations, but on the contrary in the twenty-seventh paragraph of his answer (record 61-62) we find this language:

"This defendant admits that it was provided in a certain agreement, dated June 4th, 1910, of the Washington Northern Railroad Company and the Oregon-Washington Timber Company, that the proceeds of the

sale of the $400,000 of second mortgage bonds of the timber company should be used for future extensions and betterments or equipments of the railroad company, after the expenditure of the proceeds of the sale of the $600,000 of first mortgage bonds of the timber company. But in this connection this defendant avers that the $400,000 second mortgage bonds of the timber company were pledged under the mortgage to the defendant William W. Crawford, trustee, by the joint action of the Washington Northern Railroad Company and the Oregon-Washington Timber Company."

It is true, as alleged in appellant's answer, that the Railroad Company and the Timber Company undertook to give appellant certain rights with reference to the bonds in question, but it was beyond their power to take these bonds out of the operation of the after-acquired property clause in the Railroad Company's mortgage. The bondholders whom we represent had acquired a lien upon the bonds in question as a part of their security and the mortgagor corporations could not give appellant any other than a second lien on these securities.

The contract rights of the Railroad Company arising under this agreement of June 4th, 1910, with the Timber Company were valuable rights which enured particularly for the benefit of the bondholders. If the $400,000.00 block of bonds had been marketed and the money used in the construction of extensions and betterments to the railroad there would have been an enhancement of the security commensurate with the increase in the debt. The use of the bonds for another purpose involving as it

did no enhancement in our security was prejudicial to the interests of our bondholders and cannot be upheld without our consent under the after-acquired property clause of the Railroad Company's mortgage.

In the opinion passed by the lower court on the merits, found in the record at page 171, et seq., the court discusses the effect of the after-acquired property clause in the Railroad Company's mortgage and demonstrates, as it seems to us, beyond all controversy the correctness of the position for which we contend. It would serve no useful purpose to reprint this opinion in our brief, but we commend it to the Appellate Court as a clearer and more cogent statement of the law than any that we are able to formulate.

Before leaving this branch of the case we desire again to emphasize the fact that the appellant never at any time had manual possession of the bonds in question. They have at all times been in the custody of the Mississippi Valley Trust Company (Vierling, record 274). Appellant never acquired any rights with reference thereto, except under his mortgage of March 1st, 1912, and particularly under the grants found on pages 18 and 19 and page 24 of his mortgage, which is in evidence as Complainants' Exhibit "11". The Railroad Company and the Timber Company did not have the power on the 1st of March, 1912, to make appellant the owner of these railroad bonds and they did not undertake to do so. Under the plain terms of his mortgage appellant acquired no right whatever in or to these bonds until after they had been paid and were subject to re-issue by the

Railroad Company. We have sufficiently discussed the legal effect of such re-issue if it had taken place.

MATTERS STRICKEN FROM ANSWER AND CROSS-BILL.

On the filing of appellant's answer in the court below we moved to strike out all of paragraph five of the affirmative defense, with the exception of the portions printed on pages 163 and 164 of the record. We also moved to strike out paragraphs six, seven, eight, nine, and ten of the said affirmative defense. A similar motion was filed by us directed against paragraph seven of the cross-bill, portions of paragraph fifteen, and all of paragraphs sixteen, seventeen, and eighteen. The portions of the answer moved against are those portions beginning at the first paragraph of page 75 of the record, down to the prayer on page 90 of the record. Paragraph seven of the cross-bill moved against by us is found on page 93 of the record. The remainder of the matter in the cross-bill moved against begins at the paragraph at the foot of page 128 of the record and runs down to the end of paragraph eighteen on page 141 of the record. It will be unnecessary we think to discuss these portions of appellant's pleadings in any detail.

These allegations are directed to two ultimate matters of defense:

1. It is alleged that the moneys arising from the loan floated on the 4th of June, 1910, with the knowledge and consent of a portion of the bondholders whom we represent, were disbursed in a manner contrary to the

contract between the Timber Company and the Railroad Company, of date June 4th, 1910, and in evidence as Complainants' Exhibit "13". It is not alleged that these moneys were stolen or improperly expended in any manner except that instead of being spent for the benefit of the Railroad Company they were spent for the benefit of the Timber Company. It is not alleged that all of the bondholders whom we represent had knowledge of the alleged diversion of these funds.

2. It is alleged that long subsequent to the making of our loan $150,000.00 of the funds of the Railroad Company and the Timber Company were expended in the purchase by the Railroad Company of its own stock and that a portion of the bondholders protected by the mortgages of appellees received a part of this money. It sufficiently appears that the alleged diversion of the said funds took place long subsequent to June 4th, 1910, and prior to March 1st, 1912, when appellant's rights attached.

We think this matter was properly stricken from appellant's answer for the following reasons:

1. The legal effect of the transactions alleged is not to create a defense to the foreclosure suit but to create a debt owing by the timber company to the railroad company coupled with a right on the part of the railroad company to assert an equitable charge or lien for this debt on the property purchased for the timber company.

2. The defense is essentially an allegation of ultra vires, and this proposition is not available to a creditor,

and especially not available to a creditor whose debt was not in existence at the time of the acts complained of.

3. Although the transactions are undertaken to be pleaded as an estoppel, they are in fact, if material at all, a setoff or counterclaim, and the Washington Northern Railroad Company has an election whether to assert this setoff or counterclaim in the case at bar. A subsequent mortgagee has no right to assert this election for it. The Railroad Company may be of the opinion that the mortgage security involved in this litigation will be foreclosed upon and lost in any event, and that this counterclaim can be more effectually and wisely asserted in an independent suit. In any event the election is with the Railroad Company and not with a subsequent creditor of the Railroad Company.

4. If the matter moved against is valid at all it sets up a cause of action cognizable at law and not in equity, and therefore improper to be set up in this suit under the 30th Equity Rule.

5. Appellant is not the owner of the setoff or counterclaim undertaken to be alleged, and for that reason the setoff or counterclaim is improperly pleaded in his answer, and cannot be asserted therein consistently with the 30th Equity Rule.

6. The claim asserted is not against the complainants, and its assertion in this suit is therefore in conflict with the 30th Equity Rule.

7. The claim admittedly affects only a portion of the bondholders for whom complainants are suing. It is

inequitable that other bondholders to whom this litigation is immaterial should be delayed in the collection of moneys justly due them by this litigation in which they are not interested.

8. The defendant Crawford, as appears from paragraph II of his affirmative answer, took his mortgage expressly subject to the mortgage given by Washington Northern Railroad Company to Mississippi Valley Trust Company, and expressly subject, as appears by paragrah III of his affirmative answer, to the mortgage given by Oregon-Washington Timber Company to Mississippi Valley Trust Company, and now held by complainants, and for this reason he cannot be heard to dispute the validity of the said mortgages or the amount due thereon.

We think the statement of the foregoing points is substantially all that is needed to defend the action of the court below. It is surely not necessary for us to print an argument in this brief to the effect that appellant cannot be heard to complain of transactions in the conduct of the affairs of the mortgagor corporations which took place prior to the time when his rights attached. The able solicitor who represents appellant will certainly not seriously contend that a subsequent creditor of a corporation is entitled to be heard in a court of equity to redress wrongs done the corporation prior to the time when he loaned his money and acquired his lien.

It is apparent from a reading of the portions of the answer stricken out by the lower court that the allegations amount at most to the statement of a setoff or

counterclaim which might be alleged by the Railroad Company as against the Timber Company and a setoff or counter claim which might be alleged by either or both of these mortgagor corporations against certain individuals not parties to the suit, but whom appellant desired to bring in by a cross-bill. Appellant is not the owner of either of these counterclaims. If they have any existence at all they are the property of the Railroad Company in the one case and of the Railroad Company and the Timber Company in the other case. These corporations have an election to assert their claims as a setoff in this suit or not as they see fit. They cannot be compelled to exercise such election at the instance of appellant or any other creditor.

34 Cyc. 758.

An excellent case supporting this branch of our argument is

Gillespie v. Torrance, 25 N. Y. 306, 311.

This was a case in which a surety undertook to set up a counterclaim running in favor of his principal and against the plaintiff in an action brought to enforce the joint obligation of principal and surety. The court said:

"Now it is not easy to reconcile with these established principles the right of the defendant in this suit to avail himself of the claim which Van Pelt may have against the plaintiffs on a breach of warranty. 1. Such damages constitute a counter-claim, and not a mere failure of consideration, and not being due to the defendant, cannot be claimed by him. (Code, Sec. 150; Lemon v. Trull, 13 How. Pr., 248; 16 id., 576, note.) 2. Van Pelt has a right of election whether the damages shall

be claimed by way of recoupment in the suit on the note, or reserved for a cross-action. The defendant cannot make this election for him. 3. If the defendant has a right to set up the counter-claim, and have it allowed, in this action, it must bar any future action by Van Pelt for the breach of warranty; and as no balance could be found in defendant's favor, he might thus bar a large claim in canceling a small one. If the right exists in this case, it would equally exist if the note was but $100 instead of $1,800. 4. Supposing the other notes given for the timber to have been indorsed by different persons, for the accommodation of Van Pelt, and all to remain unpaid, each of the indorsers would have the same rights as the defendant. If they were to set up the same defense, how would the conflicting claims be reconciled?"

To the same effect see

McGraw v. Pettibone, 10 Mich. 530, 537.

A large part of the matter stricken out of appellant's pleadings is an attempt on his part to set up that certain acts were ultra vires of the Washington Northern Railroad Company. We understand the law to be that the defense of ultra vires is not available to a creditor.

Force v. Age-Herald Co., 136 Ala. 271; 33 South. 866, 868.

"A creditor cannot attack a corporate transaction on the ground that it is ultra vires merely, where no fraud is charged. This right is confined to the corporation itself, or, where it refuses to act, to the stockholder, or, in a proper case, to the state."

It should be remembered in this connection that the acts complained of cannot be held to constitute a fraud

on appellant. He is a creditor both of the Railroad Company and of the Timber Company, and the diversion of assets from one of these corporations to the other cannot be held to have damaged him in his capacity as creditor. The matter alleged in his answer is a plea of ultra vires and not a plea of fraud.

Especially is the plea of ultra vires unavailable to a subsequent creditor whose rights attach subsequent to the acts complained of.

Allis v. Jones, 45 Fed. 148, 150.
Old Dominion Co. v. Lewisohn, 210 U. S. 206.

We think finally that the 30th Equity Rule is fatal to the contention of appellant that the matters moved against are available to him in the case at bar. This Equity Rule is in part as follows:

"The answer must state in short and simple form any counter-claim arising out of the transaction which is the subject matter of the suit, and may, without cross-bill, set out any set-off or counter-claim against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counter-claim, so set up, shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit both on the original and cross-claims."

The rule would seem to be perfectly clear and to require no judicial construction, but the rule has been construed by the United States District Court for the Western District of New York.

Williams Co. v. Kinsey Co., 205 Fed. 375, 376.

This was a suit brought for the infringement of a patent. The defendant set up allegations of unfair trade on the part of the plaintiff, and predicated damages to defendant thereon. In that case the defendant asserting the damages was the owner thereof, and the plaintiff was the party against whom the damages were asserted. The case was, therefore, stronger in both these particulars than the case of appellant with which we are concerned. It was nevertheless held that the counterclaim averred could not be litigated in the suit in equity. This holding seems to have been based on the fact that it was unconnected with the subject matter of the suit, and was cognizable at law rather than in equity.

Motion Picture Co. v. Eclair Co., 208 Fed. 416, 418.

In the above case it was squarely held by the United States District Court for the District of New Jersey that a counterclaim in order to be entertained in a suit in equity must be of equitable cognizance.

We think the 30th Equity Rule is decisive of the question now under consideration for the following reasons:

1. The set-offs averred do not belong to appellant, and therefore could not be asserted by him as the subject of an independent suit in equity.

2. The claims asserted do not run against the complainants, or either of them.

3. The claims asserted are cognizable at law and could not in any event be the subject matter of a suit in equity.

4. Neither of the claims arises out of the subject matter of the foreclosure suit.

The opinions of the lower court on the motion to strike, found in the record on pages 304 to 320, and on the merits, found in the record pages 171 to 178, show a thorough grasp of the complicated facts of this case and a careful, painstaking study of the briefs submitted by counsel. We submit the case in confidence that this court will find that the consideration of the case in the lower court has been thorough and the conclusions reached sound and accurate.

We have been obliged to print this brief before reading the brief of the appellant. The case was thoroughly argued by solicitors for appellant in the lower court and we have assumed that the argument and authorities to be relied on in this court will be identical with those in the court below.

APPELLANT'S BRIEF.

Since the foregoing argument was placed in the hands of the printer we have been served with appellant's brief. Every defense relied on by appellant is based on the assumption that appellant is the owner and bona fide holder of railroad bonds to the amount of $400,000.00. It is apparent that appellant is not a bona fide holder of these bonds for the following reasons:

1. The bonds are and always have been in the manual possession of the Mississippi Valley Trust Company. (Vierling 274). Under the Negotiable Instruments

Act in force in Oregon, where the bonds were executed, in Washington, where the security is situate, and in Missouri, where the bonds are payable, this circumstance is fatal to appellant's contention that he is a bona fide holder.

Lord's Oregon Laws, Sec. 6023.
Remington & Ballinger's Code, Sec. 3581.
3 Missouri Revised Statutes of 1909, Sec. 10160.

2. Appellant advanced his money and took whatever security he possesses with full notice of the rights asserted by appellees. (Complainants' Exhibit 11, p. 17 and 23.)

3. Appellant advanced his money with full notice of the agreement of June 4, 1910, to the effect that this block of railroad bonds should be sold only for the purpose of building extensions to the railroad property. (Collins 263; Complainants' Exhibits 29 and 34.)

4. By the express language of his mortgage (Complainants' Exhibit 11, pp. 18 and 19) appellant was not to become entitled to any of the railway bonds until they had been paid off and had come back into the hands of the mortgagor.

APPELLANT SUBSEQUENT TO APPELLEES IN RAILROAD SECURITY.

On page 50 of appellant's brief there is an admission that the authorities cited by the Lower Court support the conclusion of the Court that bonds which have once been paid and delivered to the mortgagor uncan-

celled cannot be reissued so as to rank in dignity with other bonds originally issued and still outstanding. We have cited a long line of authority to support our contention to this effect, and no authorities are cited to the contrary by appellant. The admission on page 50 indicates clearly that solicitor for appellant is convinced of the correctness of our position on this question of law. A lawyer of the ability and experience of the solicitor for appellant could scarcely reach a different conclusion. It should therefore be emphasized and borne in mind continually in the consideration of every question raised by appellant that bonds reissued by the mortgagor are inferior in dignity and priority to bonds of the original issue still outstanding. At the risk of tiring the Court with a repetition of that to which we have already several times directed attention we quote from pages 18 and 19 of the Crawford mortgage:

"That the Railroad Company is duly authorized and empowered to issue, use, negotiate, pledge, or assign, for its corporate purposes, its said bonds as they are surrendered and delivered to it as aforesaid.

"Now, therefore, for the consideration aforesaid, and as a part of the security furnished by the Railroad Company for the payment of the principal of and interest on the notes issued hereunder and secured hereby, *the Railroad Company does hereby further sell,* assign, pledge, transfer and set over to the Trustee (a) said $400,000 second mortgage bonds of the Timber Company; (b) *the said $1,000,000 first mortgage bonds of the Railroad Company as they are from time to time re-*

leased and delivered, or releasable and deliverable, by the said Mississippi Valley Trust Company under the terms and provisions of the said first and second mortgage deeds of trust, respectively, of the Timber Company."

Appellant has no rights whatever to railroad bonds except those created by the foregoing grant. Appellant's mortgagor did not attempt to give appellant any rights to these bonds except such rights as grow out of a reissue after the bonds had come into the hands of the mortgagor by payment or surrender. The argument of appellant, stated on page 50 of his brief, and elaborated at page 65, et seq., is that this provision in the Crawford mortgage should by construction be confined to the block of six hundred thousand bonds, one to six hundred inclusive, and that the $400,000 block of bonds should be eliminated from its effect. Under the law of contractual interpretation, as we understand it, the Court has no authority so to do. The rights of Mr. Crawford with reference to the $400,000 block of bonds are identical with his rights to the $600,000 block of bonds. The grant to him was a grant of bonds to the amount of $1,000,000 "as they are from time to time released and delivered, or releasable and deliverable, by the said Mississippi Valley Trust Company." If the Court were to strike out the figures $1,000,000 on the third line from the bottom of page 18 of Complainants' Exhibit 11, and insert in lieu thereof the figures $600,000, the Court would not construe the contract which the parties have made, but would make a new contract for them. We do not understand that any Court has

power so to do. Appellant's solicitor in his argument, beginning on page 65 of his brief, advances some reasons why the Crawford mortgage should have been drawn in such a manner as to limit the language found at the bottom of page 18 and the top of page 19 to bonds one to six hundred inclusive, and why a different form of transfer should have been made with reference to the $400,000 block of bonds. It is sufficient for present purposes to say that the parties concerned did not do this. The grant to appellant was a grant by the Railroad Company of $1,000,000 in bonds when the same should come back into the hands of the Railroad Company by payment or surrender, and should then be subject to reissue.

After-Acquired Property.

The argument of appellant on the subject of after-acquired property is chiefly directed to showing that the parties from and after the 4th of June, 1910, did not consider that railroad bonds 601 to 1,000 inclusive were pledged to secure our debt. His reliance on this branch of his argument is two-fold.

1. He contends that the agreement of June 4, 1910, already quoted in our brief, and found in the record at pages 130 to 133, manifests a belief on the part of the mortgagor defendants that the bonds in question could be sold on the open market, the proceeds to be used for future extensions, betterments or equipment of the railroad. It is undoubtedly true that if the bonds in question had been sold on the open market to innocent pur-

chasers who had no notice whatever of the agreement of June 4, 1910, or of the interest of the bondholders which we represent, that the bonds in question in the hands of such innocent purchasers would have been entitled to participate in the railroad security on equal terms with our bonds. It is also true that the bondholders whom we represent would probably have consented to such sale of the bonds on the open market if they had been assured that the proceeds of such sale were to be devoted to the purposes prescribed in the agreement of June 4, 1910. The construction of railway extensions, the making of betterments and the purchase of additional equipment for the railroad would have enhanced the security of our bondholders, and in consideration of such enhancement they would probably have been willing to waive this part of their security. It by no means follows that they had no interest or lien upon bonds 601 to 1,000 inclusive, nor does it follow that they should be deprived of their right to these bonds as against this appellant, whose money was not used for railway extensions or betterments.

2. Appellant's contention that the parties understood that railroad bonds 601 to 1,000 inclusive were free from the lien of our debt is based in part on the language of the collateral trust agreement of January 30, 1911. This agreement shows on its face that the mortgagor corporations at the time when the agreement was made were in need of further funds to the amount of $100,000 for the purchase of additional timber lands, and for the construction of new lines of railroad. It appears that certain gentlemen named in the

agreement, and described therein as the Syndicate, were willing to advance $100,000 for such purpose, on the terms and conditions set forth in the agreement. Paragraphs 1 and 2 of the agreement, found on pages 1 and 2, are as follows:

"The Timber Company is the owner of certain lands and property described in deed of trust from Oregon-Washington Timber Company to Mississippi Valley Trust Company, Trustee, made and entered into as of the fourth day of June, 1910, filed for record in Book "I" of Mortgages, page 296, of the records in the office of the County Auditor of the County of Skamania, in the State of Washington, on the tenth day of June, A. D. 1910, including Six hundred thousand dollars ($600,000.00) par value of the first moragage six per cent bonds of the Washington Northern Railroad Company, dated June 4, 1910, maturing May 1, 1928, secured under certain mortgage deed of trust executed by said Washington Northern Railroad Company to Mississippi Valley Trust Company as Trustee.

"Washington Northern Railroad Company is a corporation organized and existing under and by virtue of the laws of the State of Oregon, to construct, maintain and operate certain lines of railroad in its Articles of Association set forth, and is the owner of Four hundred thousand dollars ($400,000.00) par value, six per cent. gold bonds of the Oregon-Washington Timber Company, secured by a second mortgage on the lands and timber of said Timber Company in Skamania County, Washington, and secured also by four hundred thousand

dollars ($400,000) par value of six per cent. gold bonds of the Washington Northern Railroad Company, being a part of an issue of One Million Dollars ($1,000,000.00) of said bonds issued by said Railroad Company, secured by a first mortgage on its railroad property and equipment."

It will thus be seen that the agreement in question was made subject to the mortgages which we represent. The seventh paragraph of the agreement, found on pages three and four, recites that a new corporation (probably the Blazier Company) was to be organized, on whose behalf additional timber lands were to be purchased, and these lands were to be used as security for the payment of the advances made on the 30th of January, 1911, and we find at the conclusion of paragraph seven, on page four, the following:

"Shall also be and constitute a security for the repayment of the First Mortgage bonds of the Oregon-Washington Timber Company, in addition to the mortgage of said Company heretofore made to the Mississippi Valley Trust Company as Trustee."

On page ten of the agreement we find the following language:

"The bonds, mortgages, contracts, agreements, lands, timber and securities above listed, shall be conveyed or deposited under a mortgage or collateral trust agreement in form satisfactory to the Mississippi Valley Trust Company, as Trustee, for the repayment of the notes herein provided and the first mortgage bonds of the Oregon-Washington Timber Company, and shall

secure the payment of the said notes and bonds in the following order:

"First: They shall equally secure the payment of the notes for $100,000.00 as a first and prior lien.

Second: They shall equally secure the payment of the $600,000 First Mortgage bonds of the Oregon-Washington Timber Company as a second lien."

It will be seen that instead of waiving any of their rights under the securities which we are asserting in the case at bar the parties referred to as the Syndicate were insisting upon and were obtaining additional securities for the protection of the debt asserted in this suit. We cannot see how this agreement can be interpreted as a waiver of any of our rights or as an admission that our rights are other than as heretofore contended in this brief.

MOTION TO STRIKE.

We are surprised at the emphasis laid by appellant's brief on the alleged error of the lower court in striking out parts of appellant's answer and cross bill. The entire argument of appellant on this branch of his case is again based on the assumption that appellant is a bona fide holder of railroad bonds 601 to 1,000 inclusive. We think we have shown that he does not hold these bonds and will not become entitled to them at all until the debt which we represent has been paid in full and the bonds are subject to reissue by the mortgagor railroad. In support of his contention that he is entitled to raise the questions set up in the portion of his plead-

ings which were stricken out by the Lower Court appellant cites two cases:

Drury v. Cross, 7 Wall. 299.
James v. Railroad Co., 6 Wall. 752.

The first of these was a creditor's bill brought to set aside a sale made in fraud of creditors after a collusive foreclosure suit. Drury and Page, complainants in the suit, were creditors when the transactions complained of took place. James v. Railroad Company is the same sort of a case. We do not dispute the fact that a creditor whose debt is in existence at the time when properties of his debtor are fraudulently conveyed or collusively filched from him has a remedy by an appropriate creditor's bill. This principle is inapplicable to the case at bar. In order to support his contention that he is entitled to raise the questions relied upon appellant should produce authorities to show that a creditor may attack the transactions of his debtor occurring before his debt is created. He should also produce authorities to show that such contentions are germane to a foreclosure suit, and that even where the mortgagor does not elect to assert them a subsequent creditor and mortgagee is entitled to set them up as a defense. No such authorities have been cited and we believe that no such authorities can be found in the books.

It is argued that the affirmative matters of defense stricken out of appellant's pleadings by the Lower Court amount to an allegation of failure of consideration for our mortgages. We answer that if the matter in question is to be so interpreted that Mr. Crawford is not in

a position to allege it. His mortgage expressly recites the existence of the liens on which we rely. (See Complainants' Exhibit 11, p. 17 and 23). A second mortgagee whose mortgage recites the existence of a prior lien is estopped under all of the authorities from alleging that such prior mortgage was without consideration. In addition to the authorities heretofore cited on this question we call the Court's attention to the case of

Freeman v. Auld, 44 N. Y. 50, 53.

The matters and things relied on by appellant in this part of his pleading do not amount to payment. The reasons why this is so are set forth in the opinion of the Court more clearly and effectively than in any language which we can command. We quote a portion of the opinion of the Lower Court found on pages 315 and 316 of the record:

"Clearly the matters set up do not amount to payment of the bonds. To constitute payment something of agreement, or consent, actual or constructive, as to the application of credits, either on behalf of the trust company, or the bond holders, or the mortgagor would be necessary. Consent of the mortgagor might take the form of asking the application of payment of the funds theretofore wrongfully diverted or misappropriated, but where one claims through the debtor, such consent in some form is essential.

"The diversion of the funds from their authorized purpose is not a failure of consideration. The $540,000 agreed to be paid for the bonds, was the consideration therefor. It was paid and received by the mortgagor

and, if the agreement collateral to the mortgage between the railroad company and the Oregon-Washington Timber Company, as to its expenditure, was violated and more money expended for the benefit of the timber company than agreed, it cannot be said to be a failure of consideration for the bonds or mortgage securing them. When the money was paid for the bonds, the bond holders were not, thereafter, concerned or responsible for its disposition. If they were subsequently guilty of misconduct—having acquired the bonds in good faith—and not acting in a fiduciary relation thereto, it would not avoid the bonds, but be the subject matter of an independent cause of action.

Considering the matters set up in the answer as in the nature of a set off or counter claim, and putting to one side the question whether they are of such a nature as to warrant their pleading by the proper party, under Equity Rule 30, yet it is clear that they are causes of complaint which concern the railroad company in the one instance, and the railroad company and the Blazier Timber Company in the second instance, and that Crawford, as a subsequent mortgagee, does not control them—that they are not asserted by the holder of the right of action thereunder, if any.

MULTIFARIOUSNESS.

It is contended that the Court erred in permitting the railroad mortgage and the timber mortgage to be foreclosed in the same suit. It will be remembered by the Court that the two mortgages were given to

secure the same debt. We allege in our amended bill (Record, p. 24):

"That it was provided in the said mortgage given by Oregon-Washington Timber Company to your orator, Mississippi Valley Trust Company, that when the bonds secured thereby should be paid and cancelled by the trustee a like amount par value of the bonds of Washington Northern Railroad Company so conveyed and transferred as a part of the said security should be also cancelled by the trustee and returned to the Washington Northern Railroad Company, or delivered to the said Washington Northern Railroad Company uncancelled at its option."

No issue is joined on this allegation, but on the contrary appellant's answer on page 50 contains the following admission:

"This defendant admits that it was provided in the mortgage given by the Oregon-Washington Timber Company to the Mississippi Valley Trust Company that when the bonds secured thereby should be paid and cancelled by the trustee, a like amount par value of the bonds of the Washington Northern Railroad Company, so attempted to be conveyed and transferred as part of said security, should also be cancelled by the trustee and returned to the Washington Northern Railroad Company, or delivered to the Washington Northern Railroad Company uncancelled, at its option."

In view of the fact that the two instruments secure the same debt, and that on the payment of one of the timber company's bonds a railroad bond to the same

amount is to be surrendered as paid, we cannot see how the rights of the parties can be adequately protected excepting by the foreclosure of both mortgages in the same suit. The 26th Equity Rule is as follows:

"The plaintiff may join in one bill as many causes of action, cognizable in equity, as he may have against the defendant. But when there is more than one plaintiff, the causes of action joined must be joint, and if there be more than one defendant the liability must be one asserted against all of the material defendants, or sufficient grounds must appear for uniting the causes of action in order to promote the convenient administration of justice. If it appear that any such causes of action cannot be conveniently disposed of together, the court may order separate trials."

The Lower Court adjudged that the circumstance above alluded to was a sufficient ground for uniting these two foreclosures in the same suit. It would serve no useful purpose, but would result in great and unnecessary confusion, to reverse the cause on this ground and require appellees to assert their rights in two different pieces of litigation.

ATTORNEY'S FEES.

The decree of the Lower Court on the subject of attorney's fees was supported by all of the testimony to be found in the record. Hon. Chas. W. Fulton testified that a reasonable attorney's fee for the foreclosure of this mortgage would be 5 per cent of the amount involved, both principal and interest. (Record, pp. 254-

256.) Instead of disputing this testimony the solicitor for appellant stipulated that other gentlemen of high standing at the Oregon bar should be deemed to have testified to the same effect. No testimony to the contrary was offered. This of itself is abundantly sufficient to justify the conclusion reached by the Lower Court on this branch of the controversy. The Court has by this time seen how complicated are the facts of this case and how unusual the questions of law arising herein. In view of these facts, and also in view of the circumstances which make it necessary for counsel to be employed in Tacoma, in Kansas City, and in Portland, and in view especially of the added burden created by this appeal, we think that the Court will be led irresistibly to the conclusion that the allowance made by the Lower Court should stand.

Respectfully submitted,

EDWARD C. WRIGHT,
F. A. HUFFER,
WILLIAM H. HAYDEN,
ZERA SNOW,
WALLACE McCAMANT,

Solicitors for Appellees Mississippi Valley Trust Company and Union Trust Company.

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